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"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense

Cover Page Footnote

Visiting Associate Professor of Law, Georgetown University Law Center. B.A. Yale University, 1978; J.D. New York University School of Law, 1982. Thanks to Tanya Pilipshen and Jill Sheldon for helpful research assistance. Thanks also to Jeffrey Abramson, John Copacino, Jennifer DiToro, Paul Holland, Eva Nilsen, Cookie Ridolfi, Ilene Seidman, Heathcoate Wales, Diane Wiley, and Ellen Yaroshefsky.

“NICE WORK IF YOU CAN GET IT”:^{*} “ETHICAL” JURY SELECTION IN CRIMINAL DEFENSE

Abbe Smith^{**}

[H]ow necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him . . . [T]he law wills not that [a litigant] should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.

—William Blackstone¹

Every knowing lawyer seeks for a jury of the same sort of men as his client; men who will be able to imagine themselves in the same situation and realize what verdict the client wants.

. . . In this undertaking, everything pertaining to the prospective juror needs to be questioned and weighed: his nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads, and many more matters that combine to make a man . . .

—Clarence Darrow²

I. TWO STORIES ABOUT PICKING A JURY IN THE 1990S

A Black Man Faces a White Jury Panel

CHARLES Reed³ had the talent and good fortune to attend the United States Military Academy at West Point, where he did well, and went on to Harvard Medical School. He was every mother's dream: clean-cut, soft-spoken, and devoted to his family and church, the young African American medical student was liked and admired by all who encountered him.

No one had a bad thing to say about Reed—except the two white officers from the Cambridge Police Department who pulled him over

* George Gershwin & Ira Gershwin, *Nice Work if You Can Get It*, on Damsel in Distress (Warner Records 1937).

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1. 4 William Blackstone, Commentaries *1024.

2. Clarence Darrow, *Attorney for the Defense*, Esquire, May 1936, at 36, 36.

3. This story and the one that follows come from real cases in which I was counsel. The names in this story and the one that follows have been changed out of respect for my clients' privacy. Both clients gave me permission to write about their cases.

one morning as he was driving in his late model, shiny black Acura Integra to the lab where he worked. They claimed he had run a stop sign. He protested that he had not. They told him to stay in his car and produce his license and registration. He wanted to get out to show the officers his West Point decal on the back of his car to let them know he posed no danger. As a young black man who had been stopped by the police before,⁴ Reed found that officers were less hostile when they learned that he was a military man—an officer like them.

From there, the accounts diverge. The two officers claimed that in a fit of temper, Reed emerged from his car and assaulted both of them and needed to be forcibly taken down to the ground in order to subdue and handcuff him. Reed asserted that in response to what they considered his “uppity”⁵ behavior, the police grabbed him, pinned him against his car, threw him down to the street, shoved his face in the asphalt, handcuffed him from behind, and held him there, one officer on top of Reed, his knee digging painfully into Reed’s back.

Reed was arrested and charged with two counts of assault and battery of a police officer.⁶ He asked me to be his lawyer and I agreed. Maintaining his innocence, he rejected a lenient plea offer and requested a jury trial.

Some months later, when the nearly all-white venire entered the room for jury selection, I was not surprised. I had been practicing in both Boston and Cambridge for several years and was familiar with the demographics. Although we had talked about the likely jury pool, my client was stunned to actually see it. “You’re kidding,” he said. “These are the people who are going to choose between two white cops and me?”

4. The phenomenon of young black males being pulled over by police officers for driving late model cars—or any motor vehicle—has come to be known as “DWB” (Driving While Black). See Warren Brown, *Seat Belt Push Raises Race Issue: Blacks Weigh Tolls of Safety vs. Bias*, Wash. Post, Apr. 3, 1998, at A1 (“There are virtually no African American males—including congressmen, actors, athletes and office workers—who have not been stopped at one time or another for an alleged traffic violation, namely driving while black . . .” (quoting Michigan Congressman John Conyers, Jr.)); Editorial, *Color-Coded Expectations*, Boston Globe, Feb. 20, 1998, at A18 (noting that innocent behavior, like a black person simply “getting in [a] car” gives rise to the “common, unofficial vehicular offense dubbed DWB—driving while black”). Once African American drivers are stopped, they are subjected to greater police intrusion than white drivers. See *Traffic Stop Bias Reported*, Wash. Post, June 9, 1997, at A4 (reporting that black drivers stopped on the Florida Turnpike by law enforcement are 6.5 times more likely to be searched than white motorists).

5. See, e.g., Cheryl Lavin, *The Prime Time of Bryant Gumbel*, Chi. Trib., Sept. 28, 1997, Magazine, at 12 (referring to Bryant Gumbel, the former anchor of the “Today” show: “If you like [him], he’s confident; if you don’t, he’s arrogant. Arrogant, [Gumbel] says, is just another word for uppity.”).

6. See Mass. Ann. Laws ch. 265, § 13D (Law. Co-op. 1992). In Massachusetts, two counts of assault and battery of a police officer carry a maximum sentence of five years. See *id.*

Jury selection was over in no time, despite our efforts to render it a lengthier, more meaningful process.⁷ The judge was from the Any-Twelve-in-the-Box-Will-Do school of jury selection.⁸ He did not believe in questioning jurors individually,⁹ allowing attorneys to conduct voir dire,¹⁰ or asking would-be jurors open-ended or probing questions.¹¹ He had little patience with the questions we drafted for the

7. See generally Jeffrey Abramson, *We, the Jury* 150-51 (1994) (describing an approach to jury selection built on individualized and open-ended questioning and establishing a relationship with prospective jurors: "The key was to stimulate prospective jurors to give lengthy responses—something not easy to accomplish given most people's fear of public speaking"); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545 (1975) [hereinafter Babcock, *Voir Dire*] (espousing the importance of a searching voir dire in obtaining an impartial jury and arguing against devices that limit voir dire).

8. For some scholars, seating the first twelve jurors "out of the box" is consistent with democratic theory. See, e.g., Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1182 (1995) ("By and large, the first twelve persons picked by lottery should form the jury. . . . Juries should represent the people, not the parties."). For judges, seating the first twelve potential jurors out of the box may be more about pragmatism than political philosophy. See, e.g., Raymond Brown, *Peremptory Challenges as a Shield for the Pariah*, 31 Am. Crim. L. Rev. 1203, 1210 (1994) [hereinafter Brown, *Shield for the Pariah*] ("In most of the vicinages in America, judges are evaluated not on the Solomonic content of their opinions, but on how many cases they move. [Lawyers are not allowed to] take too much time, especially in jury selection—'Because you know counsel, I could take the first twelve people and try this case' . . .").

9. See 1 National Jury Project, Inc., *Jurywork: Systematic Techniques* § 2.11[1], at 2-72.30 (Elissa Kraus & Beth Bonora eds., 2d ed. 1997) ("[T]he group voir dire setting can impede honest statements of opinion or bias."). Robert B. Hirschhorn, a jury consultant, provides a dramatic example of individualized questioning. In a case in which a defendant was accused of stabbing a sixteen-year-old girl, each prospective juror was asked, "Can you look Kevin in the eyes and say, 'Kevin, I can give you a fair trial?'" Philipp M. Gollner, *Consulting by Peering into Minds of Jurors*, N.Y. Times, Jan. 7, 1994, at A23. Prospective jurors were excused or not depending on their response to the question and the manner in which they responded. See *id.*

10. See 1 National Jury Project, Inc., *supra* note 9, § 2.113[3], at 2-73 ("In every jurisdiction where judge-conducted voir dire is the usual practice, attorneys should try to convince the judge that voir dire conducted by attorneys is a better tool for uncovering bias." (footnote omitted)). For discussions of the efficacy of attorney-conducted voir dire over judge-conducted voir dire for uncovering bias, see Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Jurors?*, 40 Am. U. L. Rev. 703, 724 (1991) (noting that attorney-conducted voir dire tends to improve the likelihood of uncovering bias in prospective jurors, because of closer scrutiny of answers by lawyers and because lawyers are not regarded by jurors as having the same degree of authority as judges); Stephanie Nickerson et al., *Racism in the Courtroom, in Prejudice, Discrimination, and Racism* 255, 265 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (noting that when judges conduct voir dire, prospective jurors tend to give socially acceptable answers in order to please an authority figure).

11. See 1 National Jury Project, Inc., *supra* note 9, § 2.11[2], at 2-72.32 ("Open-ended, non-leading questions encourage respondents to explain their opinions and attitudes in their own words, thus penetrating stereotyped and socially desirable responses."); see also 2 *id.* § 17.03[4], at 17-52 to -55 (indicating that only when attorneys are permitted to conduct extensive voir dire into the question of racial prejudice, including asking many sensitive and specific questions, do prospective jurors ever reveal such prejudice); cf. Ann Fagan Ginger, *What Can Be Done to Minimize Racism in*

court to pose to prospective jurors¹² and generally seemed to consider voir dire a waste of time. He disparaged our assertion that race was at issue in the case,¹³ and rejected our request to question prospective jurors about their feelings regarding the interracial nature of the crime or their attitudes about young African American men, violence, and crime.¹⁴ He agreed instead to ask a watered-down question that was a composite of several proposed questions and included a reference to race.¹⁵

After this abbreviated voir dire, during which those panel members who could not be fair and impartial were excused for cause and we learned next to nothing about the others, we turned to what we *did* know in order to exercise our peremptory challenges. From the computer print-outs we were provided, we knew the prospective jurors' names, ages, where they lived, what they did for a living, and what their spouses did. From our own observations, we knew something about their race, gender, and ethnicity.

For better or worse, and with no hesitation, my co-counsel and I relied on these factors in selecting a jury. We wanted as many black or Hispanic jurors as we could get. We exercised all of our peremptory challenges to excuse whites.

A White Man Faces a Black Jury Panel

Like Charles Reed, Don Nealy was an aspiring doctor who had worked hard to get where he was. Born into a large Irish-Catholic family, he understood at a young age that college and graduate school were luxuries his parents could not afford. Nealy worked his way

Jury Trials?, 20 J. Pub. L. 427, 434-41 (1971) (describing the "probing of jurors for hidden prejudice[s]" during voir dire); Mark Soler, "A Woman's Place . . .": *Combating Sex-Based Prejudices in Jury Trials Through Voir Dire*, 15 Santa Clara L. Rev. 535, 539 (1975) (discussing "the use of voir dire in isolating, confronting, and 'minimizing' sex-based discrimination in jury trials").

12. See 1 National Jury Project, Inc., *supra* note 9, § 2.12[1], at 2-82 ("With a judge-conducted voir dire it is best to submit no more than twenty or thirty proposed questions which are clearly relevant to the issues in the case, in addition to demographic questions. . . . The questions submitted to the judge should include some that are open-ended and at least a few that require follow-up.").

13. See 2 *id.* § 17.03[4], at 17-52 ("Jurors' judgments are influenced by the race of the participants in a trial. . . . Whenever criminal defendants . . . are minority group members, attention must be directed to exploring white prospective jurors' racial beliefs and attitudes.").

14. See *id.* § 3.08[10][d]; 2 *id.* §§ 17.03[4]-[5], 21.03[3][a]-[b], 21.05[3][b] (providing sample questions for prospective jurors about their racial attitudes).

15. The judge allowed this question: "The defendant is an African American medical student. The complainants are white police officers. Is there anything about these facts that would interfere with your ability to be a fair and impartial juror in this case?" Among the jurors who raised their hands in response to this question, only one indicated that the race of the parties would affect her ability to be fair. This prospective juror, one of the few African Americans in the venire, stated that she was active in community efforts relating to police harassment of young African American males. She was excused for cause.

through high school and college and joined the Army in order to pay for medical school at the University of Maryland. In addition to his medical studies, Nealy worked part-time as a surgical technician. Married and the father of a young child, Nealy needed the extra money.

Between the demands of medical school, work, and family, Nealy had little spare time. His one indulgence was fishing, a favorite childhood pastime he had managed to maintain. He subscribed to fishing magazines, kept up with the latest fishing equipment, researched local ponds and rivers, and headed out to catch a few fish on a rare weekend morning when he was not needed elsewhere.

One such summer morning, just past dawn, he drove to the Tidal Basin in Washington, D.C. He had fished there the week before with success. He parked his car and carried his gear down to a secluded area under an overpass. As he was making his way there, he remembered a lure he had lost the previous week. He was looking for it when he came upon a homeless man who was living across from where Nealy was about to fish. He asked the man about the lost lure—more aggressively than he had intended—and an argument broke out. The homeless man took offense at Nealy's question; he thought Nealy was accusing him of taking the lure. Nealy took offense at the other man's aggressive outburst; suddenly, and for no real reason, the homeless man was spewing foul language, insults, and threats.

After some back-and-forth, Nealy began to feel that the whole thing was getting blown out of proportion. He looked around for some park police to defuse the situation. Finding none, Nealy told the homeless man he was finished arguing and just wanted to fish. But the other man was not finished. When Nealy began to fish on the other side of the stream a few feet from the steps leading down from the overpass, the other man was summoning another homeless man who was living in the area. The two men climbed up on the overpass and came after Nealy, hurling a bottle at him from above and threatening to kill him. Nealy was cornered. The only way out was up the steps to where his assailants were perched.

Outnumbered and fearing the worst, Nealy grabbed his fishing knife and ran up the stairs, yelling at the men: "Get the hell away from here. Leave me alone." This conduct enraged the second homeless man, who drew his own knife and responded to Nealy's arrival on the overpass by charging at him and stabbing him in the face. Nealy grabbed the man's arm to prevent him from stabbing Nealy again, and struck back. Adrenaline pumping, he plunged his fishing knife into the other man's body. When the man collapsed, Nealy knew he had caused serious damage. When park rangers and police officers finally arrived at the scene, Nealy urged them to get an ambulance immediately; the man had been eviscerated.

The man was pronounced dead at the hospital, and Nealy was charged with his murder. Initially represented by other counsel, when Nealy arrived at my office he had been indicted for manslaughter.¹⁶ Maintaining innocence, Nealy said that he had acted in self-defense and did not mean to kill. He requested a jury trial.

Some months later, when the nearly all-black venire entered the room for jury selection, I was not surprised. Although I was new to the D.C. area, I was familiar with the demographics. Although we had talked about the likely jury pool, my client was stunned to actually see it. "You're kidding," he said. "These are the people who are going to choose between two African American guys and me?"

As in the Reed case, jury selection was swift. The presiding judge came from the same school of jury selection as the judge in the Reed case. He denied our motion for attorney-conducted, individual, sequestered voir dire, and rejected almost all of the questions we proposed. Although he agreed that race might be an issue in the case, he was not convinced it was the overriding issue and was willing to ask only one watered-down question that was a composite of a number of requested questions and included a reference to race.¹⁷

After this abbreviated voir dire, during which the disinclined and disenchanted were excused for cause, and we learned little about the others, we turned to what we did know in order to exercise our peremptory challenges. From the computer print-outs we were provided, we knew the prospective jurors' names, ages, where they lived, and what they did for a living. From our own observations, we knew something about their race, gender, and ethnicity.

For better or worse, and with no hesitation, my co-counsel and I relied on these factors in selecting a jury. We wanted as many white jurors as we could get. We exercised most of our peremptory challenges to excuse blacks.

What's a Diligent Defense Lawyer to Do?

The above stories, though remarkably symmetrical, are not otherwise remarkable. Although I like to think of myself as an enlightened

16. See D.C. Code Ann. § 22-2403 (1981 & Supp. 1998). In the District of Columbia, murder in the second degree carries a sentence of 20 years to life. See *id.* § 22-2404. Manslaughter while armed carries a sentence of zero to 30 years, see *id.* § 22-2405, with a mandatory minimum sentencing enhancement of five years, see *id.* § 22-3202(a)(1).

17. The judge asked the following question: "The defendant is a white man who was a medical student at the time of the incident. The decedent is an African American man who was homeless at the time of the incident. Is there anything about these facts that would interfere with your ability to be fair and impartial in this case?" Although several prospective jurors raised their hands in response to the question, none specifically indicated that race was the issue. Most indicated that they had strong feelings—positive and negative—about the homeless.

criminal defense attorney¹⁸—and someone who believes that people are more than their gender, race, or ethnicity—I recount these stories without shame.¹⁹ I am a client-centered criminal defense advocate,²⁰ a partisan,²¹ and committed to representing my clients with devotion and zeal.²² In my view, I have no obligation as an attorney to fight

18. See generally Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of a Sensitive New Age Public Defender*, 28 Harv. C.R.-C.L. L. Rev. 1 (1993) [hereinafter Smith, *Rosie O'Neill Goes to Law School*] (examining criminal defense lawyering from the perspective of feminism and clinical legal education).

19. On the other hand, as a clinical law teacher, I do confess to feeling a little guilt. It could be that in the course of teaching my students to be effective criminal defense lawyers, I am teaching them to be prejudiced, or at least narrow-minded and reductive. I do what I can to avoid this, such as teaching through these issues in class, and whispering a fierce—if condensed—lecture on the complexity of race, sex, class, and ethnicity every time a student and I exercise a peremptory challenge based on these factors in court. See *infra* Part III.

20. The concept of "client-centered lawyering" has many variations. The best known model comes from the work of David Binder and Susan Price, see David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977), and later David A. Binder, Paul Bergman, and Susan C. Price, see David A. Binder et al., *Lawyers As Counselors: A Client-Centered Approach* (1991) [hereinafter Binder et al., *Lawyers as Counselors*]. In the latter book, the authors define client-centeredness as "an attitude of looking at problems from clients' perspectives, of seeing problems' diverse natures, and of making clients true partners in the resolution of their problems." Binder et al., *Lawyers as Counselors*, *supra*, at xxi; see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501, 507 (1990) (defining client-centered counseling as enabling clients to make their own decisions); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. Rev. 717, 720 (1987) (describing a "client-centered practice" as one which takes seriously the principle of client decision-making). At a minimum, client-centered lawyering means listening to clients. See Binder et al., *Lawyers as Counselors*, *supra*, at 4. At the other of the spectrum are those who argue that, to be client-centered, lawyers should defer entirely to client "stories" in all substantive and strategic decisions. See, e.g., Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485 (1994) (arguing that client narratives ought to control decisions about case theory); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990) (arguing that lawyers do clients a disservice when they pay more attention to law than to clients' stories). In my view, a client-centered and effective lawyer may well consider and reject client stories. See Smith, *Rosie O'Neill Goes to Law School*, *supra* note 18, at 27-37 (arguing that there is a middle ground between client-centered and lawyer-centered decision-making).

For descriptions of client-centeredness as a component of zealous criminal defense, see Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239, 1250-54 (1993) (discussing client-centered justifications for zealous advocacy by public defenders) and Barbara Allen Babcock, *Defending the Guilty*, 32 Clev. St. L. Rev. 175, 184 (1983-1984) [hereinafter Babcock, *Defending the Guilty*] (discussing the criminal defense "tradition of unmitigated devotion to the client's interest").

21. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 605 (1985) (acknowledging that "the case for undiluted partisanship is most compelling" in criminal defense).

22. The first codification of the requirement of zeal in this country was in 1908. See Canons of Professional Ethics Canon 15 (1908) (noting the lawyer's obligation to give "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability"); see

cultural stereotypes unless they are being used against my client, or to serve the interests of the broader community, unless this somehow also serves my client.²³

It is not that I believe that racial or demographic stereotypes are an accurate proxy for the attitudes and life experience of all prospective jurors. I do not.²⁴ It is that, absent a meaningful exploration of the

also Model Code of Professional Responsibility Canon 7 (1969) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); Model Rules of Professional Conduct Rule 1.3 cmt. 1 (1995) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). For examinations of zealous advocacy with an emphasis on criminal defense, see Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) (examining zealous advocacy in the context of criminal defense); David Luban, *Are Criminal Defendants Different?*, 91 Mich. L. Rev. 1729, 1757-58 (1993) [hereinafter Luban, *Criminal Defendants*] (same). See also Monroe H. Freedman, *Understanding Lawyers' Ethics* 65-86 (1990) [hereinafter Freedman, *Understanding Lawyers' Ethics*] (discussing the ethic of zeal, which is "pervasive in lawyers' professional responsibilities"); David Luban, *Lawyers and Justice: An Ethical Study* 12 (1988) [hereinafter Luban, *Lawyers and Justice*] ("[A] lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client will prevail."); Babcock, *Defending the Guilty*, *supra* note 20, at 184 (discussing the "tradition of unmitigated devotion to the client's interest" in criminal defense); Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951-1952) (discussing the ethical standards of zeal and devotion to client); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum. L. Rev. 1004, 1019 (1990) ("In the criminal defense paradigm, adversary advocacy is a crucial device for protecting, and indeed overprotecting, the rights of individuals against a powerful and potentially dangerous bureaucratic institution.").

23. For the classic statement of this single-minded devotion to client, see Lord Brougham's speech in 1 *The Trial of the Queen of England in the House of Lords* 16 (London, Thomas Kelly 1821) ("At present I hold [these dangerous and tremendous] questions to be needless to the safety of my client; but when the necessity arrives, an advocate knows but one duty, and, cost what it may, he must discharge it. Be the consequences what they may, to any other persons, powers, principalities, dominions, or nations, an advocate is bound to do his duty . . ."). But see Anthony V. Alfieri, *Defending Racial Violence*, 95 Colum. L. Rev. 1301, 1321 (1995) (noting that "[n]either the Model Code nor the Model Rules expressly sanction the use of racialized narratives").

24. See Abramson, *supra* note 7, at 171-76 (arguing that a juror's individual life experience is more important than his or her race, gender, religion, national origin, or age). Abramson is critical of the notion that any demographic characteristic can be a proxy for who a prospective juror is:

[T]he ideal of a jury that represents different groups in the community is an ideal that fosters cynicism when it comes to the practical parameters of jury selection. All potential jurors, the [trial lawyer] manuals state, inevitably bring with them the views and biases built into their race, religion, age, and gender. These preconceptions supposedly influence the eventual verdict as much, if not more than, the evidence presented at trial. The task of the lawyer, therefore, is to outsmart the system—to figure out the demographics of justice and to manipulate it during jury selection by eliminating jurors with the so-called wrong personal characteristics.

Id. at 143 (footnote omitted); see also 1 National Jury Project, Inc., *supra* note 9, § 7.02[2][b], at 7-6 to 7-8 (observing that demographic characteristics are a factor in jury selection when potential jurors presume the guilt of a defendant).

latter,²⁵ I am stuck with the former, and it would be foolhardy or worse not to at least consider the generalizations on which the stereotypes are based.²⁶ Indeed, in this article, I argue that it is unethical for a defense lawyer to disregard what is known²⁷ about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky*²⁸ and its progeny.²⁹ I argue that although *Batson* (and *Georgia v. McCollum*,³⁰ which extended the prohibition against race-based peremptory challenges to criminal defendants) has spawned an "ethics" of its own,³¹ this new ethics is at odds with other long-standing and controlling ethical obligations of criminal defense lawyers.³²

In part II, I discuss the new ethics of jury selection derived from *Batson* and its progeny. In part III, I examine the social science data on race, gender, and juror attitudes, supplemented by my own experience as a criminal trial lawyer and teacher. In part IV, I argue that the new ethics of jury selection ignore the impact of race and gender on jurors' attitudes and thus are directly contrary to the mandate of zealous criminal defense and serve to disadvantage the criminally accused.

II. THE NEW ETHICS OF JURY SELECTION

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [Race-based] [s]election procedures . . . undermine public confidence in the fairness of our system of justice.

—*Batson v. Kentucky*³³

25. See Randall Kennedy, *Race, Crime, and the Law* 220-27 (1997) (discussing the deficiencies of voir dire as it is typically conducted); see also Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. Rev. 923, 930 (1995) (reviewing Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* (1994)) ("As long as voir dire is limited and counsel is prevented from exploring juror predispositions in a meaningful way, peremptory challenges are an important safety valve.").

26. See Abramson, *supra* note 7, at 171 ("[Social science data] generates probabilistic statements about the attitudes or biases of a specific group. Within limits, probabilistic theorems may be of use to lawyers, enabling them to play the odds or make educated bets.").

27. See *infra* Part III.A (discussing research on race, sex, and juror attitudes).

28. 476 U.S. 79, 84 (1986) (holding that when prosecutors exercise peremptory challenges based on race, they violate the Equal Protection Clause of the Fourteenth Amendment).

29. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (holding that the exercise of peremptory challenges based on gender violates the Equal Protection Clause).

30. 505 U.S. 42, 59 (1992) (holding that race-based peremptory challenges by defense counsel violate the Equal Protection Clause).

31. See Abramson, *supra* note 7, at 175 (referring to the "new ethic" in jury selection created by *Batson* and *J.E.B.*); see also *infra* Part II (discussing the new ethics under *Batson*, *McCollum*, and *J.E.B.*).

32. See *infra* Part IV (discussing the ethical requirement of zealous advocacy in the context of jury selection).

33. 476 U.S. at 87.

Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.

—*Georgia v. McCollum*³⁴

Since *Batson*, . . . [w]e have recognized . . . [a] right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. . . .

. . . .
 . . . Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.

—*J.E.B. v. Alabama*³⁵

For practical purposes, the lawyers are the law.

—David Luban,
*Lawyers and Justice: An Ethical Study*³⁶

Nothing in the applicable rules, codes, and standards governing the professional responsibility of criminal defense lawyers explicitly prohibits race- or gender-based jury selection.³⁷ At best, the direction provided by the ethical rules relating to race- or gender-based lawyering is ambiguous.³⁸ Until recently, most of the literature on criminal

34. 505 U.S. at 50.

35. 511 U.S. at 128, 140.

36. Luban, *Lawyers and Justice*, *supra* note 22, at xvii.

37. This is true of the Model Code of Professional Responsibility, the Model Rules of Professional Conduct, and the Standards Relating to the Administration of Criminal Justice: The Defense Function.

38. See, e.g., Model Code of Professional Responsibility EC 9-2 (1980) ("When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."). Any criminal lawyer worth his or her salt would argue that employing all available legal means to thwart a prosecution, or at least put it to the test, ensures the integrity of our legal system. See, e.g., Standards Relating to the Admin. of Criminal Justice Standard: The Defense Function § 1.1(b) (1974) ("The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate, with courage, devotion and to the utmost of his learning and ability, and according to law."); Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, *Legal Times*, Sept. 6, 1993, at 22 (discussing what motivated him to zealously undertake the representation of an alleged Nazi war criminal); cf. Alan M. Dershowitz, *The Best Defense* 411 (1982) [hereinafter Dershowitz, *Best Defense*] (suggesting that the lack of zeal by defense lawyers poses a greater threat to the criminal justice system than too much zeal). But see Alfieri, *supra* note 23, at 1321 (remarking that neither the Model Code nor the Model Rules "expressly sanction[s]" race-based advocacy).

defense ethics had been silent on this question.³⁹ If a message can be gleaned from most of the scholarship and commentary on criminal defense, it is that jury selection is critical to the outcome of a criminal trial,⁴⁰ and, in this, as in all things, the client comes first and everything and everyone else be damned.⁴¹

This was the ethical landscape when, in 1986, the Supreme Court decided *Batson*—a decision about which many defense lawyers rejoiced⁴² because of its potential to prevent prosecutors from engineering all-white jury trials.⁴³ The pleasure, however, was short-lived. First, it became clear that the new obstacles created by *Batson*

39. See, e.g., John M. Burkoff, *Criminal Defense Ethics* (1990) (setting forth ethical guidelines for criminal defense attorneys); *Ethical Problems Facing the Criminal Defense Lawyer* (Rodney J. Uphoff ed., 1995) (discussing ethical problems facing criminal defense attorneys generally). But see Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 Geo. J. Legal Ethics 1 (1994) (examining the ethics of relying on bias and stereotypes in criminal defense); Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 Ann. Surv. Am. L. 135, 153-55 (proposing a code of conduct requiring a lawyer "not [to] ask questions or behave in a manner which intentionally emphasizes or relies upon sex, race, or national origin stereotypes when the question or behavior is designed to mislead a jury or unfairly prejudice a witness or party").

40. See Abramson, *supra* note 7, at 143 ("There is a famous lawyers' quip about the difference between trials in England and trials in the United States: in England, the trial starts when jury selection is over; in the United States, the trial is already over."); Babcock, *Voir Dire*, *supra* note 7, at 565 ("[W]e should recognize voir dire as the historically evolved, constitutionally important instrument that it is.").

41. See *supra* notes 20-22.

42. See Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1101 (1994) [hereinafter Ogletree, *Just Say No*] ("*Batson* has been viewed as a major accomplishment in the effort to eliminate this form of jury discrimination."); see also *Batson v. Kentucky*, 476 U.S. 79, 102 (1985) (Marshall, J., concurring) (heralding the case as a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries").

43. See generally Kennedy, *supra* note 25, at 204-08 (discussing the various views underlying the Court's decision in *Batson*). As Kennedy noted,

Two beliefs animated the *Batson* decision. One was that prosecutors had overused racially discriminatory peremptories—that they had too often exercised their privilege in a sloppy, unthinking, reflexive manner. . . .

The second belief animating *Batson* eclipses the first. This belief is that racial discrimination by the government in the exercise of peremptory challenges is not only bad when used to disenfranchise black potential jurors consistently but also when used as a trial-related tactic in a single instance.

Id. at 205.

There is a long history of prosecutors excusing African American jurors from criminal cases involving African American defendants. See *Batson*, 476 U.S. at 103-04 (Marshall, J., concurring). In his concurring opinion in *Batson*, Justice Thurgood Marshall provided statistics from Missouri, Louisiana, South Carolina, and Texas which indicate the widespread prosecutorial practice of striking black jurors. For example, as Justice Marshall noted, "[i]n 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white." *Id.* at 104 (Marshall, J., concurring).

were not much harder for prosecutors to overcome⁴⁴ than those that existed under previous law.⁴⁵ Then, in *Georgia v. McCollum*,⁴⁶ the Court ruled that *Batson* applied to criminal defendants as well as prosecutors.⁴⁷ Two years later, the Court extended

44. See *Batson*, 476 U.S. at 105-07 (Marshall, J., concurring) (noting the difficulties defendants have in demonstrating a prima facie case of juror discrimination based on numbers alone and in otherwise attributing to prosecutors a racial motive); see also Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 170-80, 199-201 (1989) (discussing prima facie proof of a discriminatory purpose and the "unconstitutionality" of the peremptory challenge); Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA Women's L.J. 35, 56-67 (1992) (discussing practical problems with applying *Batson* to gender discrimination); Ogletree, *Just Say No*, *supra* note 42, at 1105-13 (discussing the failure of lower courts to consistently apply *Batson*); Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 Willamette L. Rev. 293 (1989) (discussing lower courts' implementation of *Batson*); Stephen R. DiPrima, Note, *Selecting a Jury in Federal Criminal Trials After Batson and McCollum*, 95 Colum. L. Rev. 888, 903-14 (1995) (discussing the application of *Batson* and *McCollum* by the federal courts); Andrew G. Gordon, Note, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 Fordham L. Rev. 685, 693-710 (1993) (examining the many ways in which prosecutors can engage in pretextual reasoning under *Batson*); David D. Hopper, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 836-39 (1988) (discussing systematic alterations to the *Batson* analysis).

45. See *Swain v. Alabama*, 380 U.S. 202, 222-23 (1965) (holding that in order for a criminal defendant to demonstrate purposeful discrimination in jury selection he or she must show that prosecutors had established a peremptory challenge system for excluding black jurors). One court called this test "Mission Impossible." *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d Cir. 1984). The *Batson* court rejected Swain's "crippling burden of proof." *Batson*, 476 U.S. at 92.

46. 505 U.S. 42 (1992).

47. See *id.* at 59 ("[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by [either] party."). Justice Thurgood Marshall articulated this position in his concurring opinion in *Batson*: "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)). In *Batson*, Justice Marshall was unmoved by the argument that defendants' peremptories are different, and that the unfettered exercise of defense peremptory challenges is essential to obtaining a fair and impartial jury. He derided the suggestion that there is any historical significance to defendants' peremptory challenges. "Much ink has been spilled regarding the historic importance of defendants' peremptory challenges." *Id.* at 108 (Marshall, J., concurring). He would rather have eliminated peremptory challenges altogether than allow jury discrimination: "If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay." *Id.* (Marshall, J., concurring).

Interestingly, Justice Clarence Thomas, not generally known for his concern for the rights of minorities, the poor, or the criminally accused, expressed deep concern about limiting a defendant's exercise of peremptory challenges precisely because of prejudice against poor, black defendants. See Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 Wm. & Mary L. Rev. 21, 51 (1993) [hereinafter Johnson, *Language and Culture*]. He recognizes who will bear the burden of the new ethics of jury selection:

those rulings to apply to gender-based peremptory challenges.⁴⁸

Although *Batson*, *McCullum*, and *J.E.B.* are constitutionally driven, they express a deep concern about professional ethics and institutional values.⁴⁹ The cases raise questions about what lawyers ought to be able to do and how far lawyers should go within the adversary system.⁵⁰ They address concerns about the integrity and legitimacy of the justice system.⁵¹ They offer the Court's view of what it means for

I doubt that this [ruling] will produce favorable consequences. On the contrary, I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.

. . . [This Court has] observed that the racial composition of a jury may affect the outcome of a criminal case. . . . "It is well known that prejudices often exist against particular classes in the community, which sway the judgement of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." We thus recognized, over a century ago, the precise point that Justice O'Connor makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.

McCullum, 505 U.S. at 60-61 (Thomas, J., concurring) (citations omitted) (citing and quoting *Strauder v. Virginia*, 100 U.S. 303, 309 (1880)); see *supra* note 93. In contrast to Justice Marshall, who wanted the law of jury selection to conform to a nondiscriminatory ideal, Justice Thomas is a realist here, concerned more with how people are than how he would like them to be. "[C]onscious and unconscious prejudice persists in our society and . . . it may influence some juries. Common experience and common sense confirm this understanding." *Id.* at 61.

48. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

49. See Abramson, *supra* note 7, at 175 (referring to the "new ethic the Supreme Court set for jury selection when it outlawed race- or sex-based peremptory challenges"); cf. Timothy Kaine, *Race, Trial Strategy and Legal Ethics*, 24 U. Rich. L. Rev. 361, 373 (1990) ("Nothing in the *Batson* opinion discusses the ethical acceptability of racially based trial strategy."). At least one commentator notes the tension between existing ethical rules and the Constitutional law created by *Batson*. See Ogletree, *Just Say No*, *supra* note 42, at 1104 ("Striking jurors on the basis of race or gender is not always an irrational act; it can sometimes be . . . in keeping with the litigant's goals . . ."). Unfortunately, Professor Ogletree fails to fully examine the values on both sides of the equation and resolves the matter by asserting that some values are just more important than others. See *id.* ("[Race- and gender-based challenges] would simply be part of effective advocacy were it not entirely repugnant to the values and standards of the Constitution, values that should and do override the litigant's interest in winning.").

50. See *McCullum*, 505 U.S. at 57 (finding that defense lawyers are limited to "lawful, legitimate conduct," and, hence, may not exercise peremptory challenges on the basis of race).

51. See *id.* ("It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race."); *Batson*, 476 U.S. at 87 (asserting that when prospective jurors are struck on the basis of race the public loses faith in the justice system).

Given the common practice of prosecutors of resisting full compliance with *Batson*, see *supra* note 44,—a practice shared by many defense lawyers in the face of a "reverse *Batson* challenge"—the "ethics" and "values" promoted by *Batson* and its progeny may well be hypocrisy and subterfuge. This is unfortunate but unsurprising in view of the intensely adversarial nature of most criminal trials. In my view, it would

lawyers to "do the right thing"⁵² as citizens as well as members of the Bar.

In accordance with these cases, there is an increasing number of scholars who argue that the persistence of racial and sexual stereotyping in court is the fault of lawyers,⁵³ and has an enormous social cost.⁵⁴ Some have proposed ethical rules to address the problem.⁵⁵

promote fairness and candor if prosecutors were required to comply with *Batson* as a matter of constitutional law and professional ethics, see Standards Relating to the Admin. of Criminal Justice: The Prosecution Function § 1.1(c) (1974) ("The duty of the prosecutor is to seek justice, not merely to convict."), and defense lawyers were relieved of this burden entirely because of the different role that defense lawyers fill. See *McCollum*, 505 U.S. at 63-68 (O'Connor, J., dissenting); Luban, *Criminal Defendants*, *supra* note 22, at x.

52. See *Do The Right Thing* (Forty Acres and a Mule Filmworks 1989). Spike Lee's provocative film about racial tension in a Brooklyn neighborhood, in which race is a defining experience, has much to offer those contemplating race and jury selection.

53. See Kennedy, *supra* note 25, at 256-77, 284-95 (examining appeals to race by both prosecutors and defense lawyers). See generally Alfieri, *supra* note 23 (arguing against race-based defense theories).

54. See Alfieri, *supra* note 23, at 1342 ("[T]o deny, exploit, and ultimately demean race in the name of advocacy wounds our clients, their communities, and ourselves.").

55. See, e.g., Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 Geo. J. Legal Ethics 781, 785 (1996) (proposing to amend Model Rule 8.4 to include the following: "It is professional misconduct for a lawyer to . . . commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity, or gender, if intended to intimidate litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage.") (emphasis added); Gordon, *supra* note 44, at 713 ("A lawyer shall not discriminate on the basis of race, sex, religion, or national origin against a member of the venire during jury selection." (citing Model Rules of Professional Conduct Rule 3.1.5)); cf. Yaroshesky, *supra* note 39, at 153 ("A code of conduct could state that 'a lawyer shall not ask questions or behave in a manner which intentionally emphasizes or relies upon sex, race, or national origin stereotypes when the question or behavior is designed to mislead a jury or unfairly prejudice a witness or party.'").

One proposed ethical rule was created from the concerns expressed in *Batson*.

Discrimination in the jury selection process has no place in our judicial process. The discriminatory use of peremptory challenges not only harms litigants and the excluded juror but undermines public confidence in our judicial system. Thus, a lawyer exercising peremptory challenges in a discriminatory manner suggests an inability to fulfill the lawyer's professional role as a public citizen concerned with the fair administration of justice.

Gordon, *supra* note 44, at 713 (citations omitted).

At least sixteen states and the District of Columbia have passed ethical rules prohibiting lawyers from engaging in discriminatory conduct. See Taslitz & Styles-Anderson, *supra* note 55, at 781 n.4. Other states are actively considering adopting such a rule. See *id.* at 782 n.6.

At least one commentator proposed changing the Rules of Criminal Procedure. See Pam Frasher, *Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 Iowa L. Rev. 1327, 1345-51 (1995) (proposing to limit the number of peremptory challenges and allowing more attorney-conducted voir dire).

There is no question that there are some compelling reasons to end race and sex discrimination in jury selection.⁵⁶ As the Supreme Court dramatically put it, it "denigrates the dignity"⁵⁷ of African Americans and women to be excluded from jury service simply because of race or gender, and "reinvokes a history of exclusion from political participation."⁵⁸ In addition, it sends a message to "all those in the courtroom, and all those who may later learn of the discriminatory act . . . that certain individuals, for no reason other than gender [or race] are presumed unqualified . . . to decide important questions upon which reasonable persons could disagree."⁵⁹

56. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1994) (observing that discrimination based on gender causes harm to "the litigants, the community, and the individual jurors"); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (stating that, for example, "[t]he petit jury has occupied a central position in our adversary system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge"). Racism in jury selection has a long and shameful history. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 882-97 (1994). See generally Kennedy, *supra* note 25, at 68-180; Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 Wis. L. Rev. 511; Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1 (1990). For a poignant account of the exclusion from jury service of an African American who had been a decorated soldier in the Spanish-American War, see J. Anthony Lukas, *Big Trouble* 139 (1997). Lukas writes:

When [J. Gordon] MacPherson was accepted by both sides, the eleven white jurors objected to serving on a jury, and thus being forced to associate intimately, with a black man. Ultimately, the judge removed MacPherson. The former corporal, among the first men to reach the crest of San Juan Hill, felt his humiliation keenly. "I'm an American citizen," he said, "I fought for the country and went through yellow fever in Cuba in the service of this country. I wonder how many of those who have treated me this way have done as much for the country."

Id.

Sexism in jury selection has its own ignoble history. See *J.E.B.*, 511 U.S. at 131-35 (discussing the exclusion of women from American juries until the 20th century); *id.* at 132 (noting that the prohibition of women serving on juries came from English common law and the doctrine of *propter defectum sexus*, or the "defect of sex" (quoting 2 Blackstone, *supra* note 1, *362)); see also Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139 (1993) (analyzing whether peremptory challenges of women due to their gender should be prohibited based on *Batson's* reasoning).

57. *J.E.B.*, 511 U.S. at 142; see also *id.* ("Striking individual jurors on the assumption that they hold particular views simply because of their gender is practically a brand upon them, affixed by the law, an assertion of their inferiority." (internal quotation marks and citations omitted)).

58. *Id.*; see also Phoebe A. Haddon, *Rethinking the Jury*, 3 Wm. & Mary Bill Rts. J. 29, 56-61 (1994) (discussing jury service as an important aspect of citizenship).

59. *J.E.B.*, 511 U.S. at 142; see also Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 Am. Crim. L. Rev. 1177 (1994) (examining the effects of race-conscious jury selection on public perceptions of fairness).

Even if we agree that social justice⁶⁰ might be advanced by prohibiting certain legal practices, however, this does not resolve the question of professional ethics or, for that matter, procedural fairness. To some, justice would be advanced by forbidding lawyers from engaging in any sort of meaningful advocacy in certain circumstances.⁶¹ To others, justice would be advanced by abrogating the most fundamental procedural rights of the accused.⁶²

Ethics do not require a lawyer to advance some broad notion of social justice. This applies to lawyers engaged in civil as well as criminal practice. Consider corporate lawyers, whose main obligation is to preserve the rights of the rich and powerful against the poor and pow-

60. There is, of course, a question about what we mean by "social justice." In my view, unbridled partisanship on behalf of an indigent criminal defendant is consistent with a quest for both individual and social justice. In attempting to preserve my clients' liberty against an increasingly overreaching, bent-on-incarceration government, I believe I am pursuing both my clients' immediate interest and a broader social justice goal. Others disagree. *See, e.g.,* Alfieri, *supra* note 23, at 1301-06 (critiquing the narrow role and narrow-minded approach of criminal defense lawyers). Alfieri suggests that criminal defense lawyers are only concerned about our clients' narrow "legal identity," and not their "social identity." *Id.* at 1307. He proposes that criminal defense lawyers take on a "community-centered obligation" of "race-conscious responsibility" in order to "shape . . . a client's social identity." *Id.*

61. *See, e.g.,* Luban, *Lawyers and Justice*, *supra* note 22, at 151-52 (arguing that criminal defense lawyers should not be allowed to humiliate rape complainants through a cross-examination that suggests they were willing sexual partners). Luban maintains this position whether or not the complainant's accusation of rape is truthful.

[T]he cross-examination is morally wrong, even if the victim really did consent to sex with the defendant. Just as the rights of the accused are not diminished when he is guilty, the right of women to invoke the state's aid against rapists without fear of humiliation does not diminish when a wom[an] abuses it by making a false accusation. This implies that balancing the defendant's rights against the rape accuser's rights in order to determine the moral bounds of zealous advocacy must be done without considering either the defendant's guilt or the accuser's innocence. What's good for the gander is good for the goose.

Id. at 152; *see also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031 (1975) (arguing that our system of adversarial advocacy ought to be modified in order to pursue the truth); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 Geo. J. Legal Ethics 125 (1987) (arguing that criminal defense lawyers should not be able to put forward a false defense).

62. *See, e.g.,* Harold J. Rothwax, *Guilty: The Collapse of Criminal Justice* 35-120, 186-221 (1996) (arguing that *Miranda* ought to be overruled, the Fourth, Fifth, and Sixth Amendments eviscerated, the requirement of unanimous verdicts abolished, and speedy trial requirements lifted).

Some seemingly benign reform proposals would also abrogate fundamental principles underlying our justice system. *See, e.g.,* George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* 241-58 (1995) [hereinafter Fletcher, *With Justice for Some*] (arguing for a greater role for victims in criminal trials).

erless. These lawyers may well be thwarting social justice,⁶³ but they cannot be said to be unethical.⁶⁴

In the criminal sphere, there are competing "ethical regimes."⁶⁵ Aside from specific ethical obligations that may conflict with a broad notion of social justice,⁶⁶ most criminal lawyers represent the poor.⁶⁷ There is a compelling argument that criminal lawyers who zealously represent the indigent accused are working for social *change* as well as social justice by challenging both the "maldistribution of political power in America . . . [and] the maldistribution of wealth."⁶⁸ In my view, criminal lawyers are not only ethical, but they are highly moral actors⁶⁹ when they seek to thwart the prevailing *legal regime* on behalf of those who bear the brunt of law's violence.⁷⁰

63. See Luban, *Lawyers and Justice*, *supra* note 22, at 237 (noting Justice Louis Brandeis's "fear that the 'corporation lawyer' was engaged in a form of practice that had as its ultimate effect the enhancement of private wealth at the expense of the public good . . .").

64. For a powerfully argued book that calls for lawyers to "make the law more just" and to engage in "moral activism," see *id.* at xvii, xxii. In the book, Luban discusses Justice Brandeis's notion of a "people's lawyer," who, in contrast to lawyers working for large corporations, would "take the have-nots as clients and work to change the system along the lines of a progressive redistribution." *Id.* at 237.

For a gripping nonfiction account of a legal battle that pitted powerless members of a community dying from leukemia against big corporations and their lawyers, see Jonathan Harr, *A Civil Action* (1995).

65. Alfieri, *supra* note 23, at 1320.

66. See *infra* Part IV.

67. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 Mercer L. Rev. (forthcoming 1999).

68. Luban, *Lawyers and Justice*, *supra* note 22, at 237 (paraphrasing Brandeis).

69. See generally Smith & Montross, *supra* note 67.

70. See generally *Law's Violence* (Austin Sarat & Thomas R. Kearns eds., 1992) (discussing the impact of violence on the law). As Sarat and Kearns write in the Introduction to this fine collection of essays, "violence, as a fact and a metaphor, is integral to the constitution of modern law, and that law is a creature of both literal violence, and of imaginings and threats of force, disorder, and pain." Austin Sarat & Thomas R. Kearns, *Introduction* to *Law's Violence*, *supra*, at 1, 1 (citations omitted). This is so in this country as well as in more notoriously violent ones: "Constitutional, democratic, humane legal orders are distinguishable from their lawless, authoritarian, and barbaric counterparts by the ways they authorize and use the coercive force at their disposal. . . . Yet constitutional violence is violence nonetheless; it crushes and kills with a steadfastness equal to a violence undisciplined by legitimacy." *Id.* at 5; see also Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986) ("[All] [l]egal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."); Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in *The Fate of Law* 211 (Austin Sarat & Thomas R. Kearns eds., 1991) ("[T]he general link between law and violence and the ways that law manages to work its lethal will, to impose pain and death while remaining aloof and unstained by the deeds themselves, is still an unexplored and hardly noticed mystery in the life of the law.").

The new ethics of jury selection embrace a worthy ideal, but one that is lofty and Platonic, as well.⁷¹ The new ethics share much with those who believe that law should reflect the "color-blind" society in which we live.⁷² The problem is that we do not live in a color-blind—or, for that matter, gender-blind—society and citizens, no matter how well-intentioned, do not suddenly abandon racist or sexist attitudes when summoned for jury duty.⁷³

The lofty idealism of the new ethics sits uncomfortably in the rough and tumble world of criminal defense. An alternative and, I think, equally ethical position acknowledges the very real context in which criminal jury selection takes place. At worst, my position could be called a cynical sort of legal ethics; at best, it is pragmatic and wise and serves to redress a continuing inequity.⁷⁴

With regard to this alternative ethical framework, it is important to note that we live in an increasingly punitive society,⁷⁵ one that offers little compassion to criminal wrongdoers.⁷⁶ It is also important to rec-

71. See *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) (referring to the "ideal of nondiscriminatory jury selection we espoused in *Batson*").

72. See, e.g., Kennedy, *supra* note 25, at 237-55 (arguing against jury reforms intended to increase the number of blacks on juries). Although Professor Kennedy concedes that "race matters" in the administration of criminal justice, *id.* at 252, he bristles at the suggestion that we fashion policies or practices that explicitly recognize race in the criminal law. See *id.* At the heart of Professor Kennedy's embrace of color-blindness in the criminal law is a well of optimism about race in America:

Perhaps the most fundamental way in which I differ from at least some of those who back the reforms I oppose is that I believe that racial conflict is not inevitable, that it can be overcome, and that a morally good and politically realistic way to help in doing so is to decline to formalize race-mindedness in jury selection.

Id. For a trenchant critique of Professor Kennedy's position on color-blindness, see Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 Harv. L. Rev. 1270 (1998).

73. See *McCollum*, 505 U.S. at 68 (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); see also *id.* at 60-61 (Thomas, J., concurring) (agreeing with Justice O'Connor and noting that the press regularly reports the number of white and black jurors in high profile cases, reflecting a recognition that racial prejudice is a fact of life).

74. See Abramson, *supra* note 7, at 127-31 (analogizing to affirmative action).

75. See Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later 1* (The Sentencing Project ed., 1995) (finding that one in three African American males are currently under the supervision of the criminal justice system, either in prison or jail, or on probation or parole); Fox Butterfield, *Crime Keeps on Falling, but Prisons Keep on Filling*, N.Y. Times, Sept. 28, 1997, at D1 (noting that the rate of incarceration continues to rise despite the decrease in crime rates). See generally Lois G. Forer, *A Rage to Punish: The Unintended Consequences of Mandatory Sentencing* (1994) (discussing the effects of mandatory sentencing laws).

76. See, e.g., Somini Sengupta, *Haunted Juror Tells of a Divided Panel Deciding for Death*, N.Y. Times, June 8, 1998, at A1 (reporting that, in the first capital murder trial in New York since the reinstatement of the death penalty, jurors believed that the horror of the crime outweighed the defendant's prior heroism as a prison guard, prior

ognize that attitudes about race and crime are difficult to disentangle.⁷⁷ Although race is perhaps more complicated, we are not better at dealing with gender than we are with race.⁷⁸

It cannot be *unethical* for criminal defense lawyers to recognize that there is something different about representing an accused, or that there is something uniquely burdensome, distinctly challenging, and sometimes even frightening about selecting a jury to judge an accused. It cannot be *unethical* for criminal defense lawyers to act in conformity with the understanding that most jurors do not accept the presumption of innocence or the right of a defendant not to testify without adverse inference.⁷⁹ It cannot be *wrong* for defense lawyers to do what they have to do to make a tough fight a slightly fairer one.

It is simply not so that a concern about social justice, which often translates into a concern about the needs and interests of the larger "community," "public," or "society,"⁸⁰ must always trump individual rights.⁸¹ Not only is the Bill of Rights supposed to ensure that this

lack of criminal record, and mother's plea for mercy); Sam Howe Verhovek, *As Texas Executions Mount, They Grow Routine*, N.Y. Times, May 25, 1997, at A1 (reporting the record number of executions occurring in Texas in 1997, where "the death penalty is becoming a matter of routine").

77. See, e.g., Studs Terkel, *Race: How Blacks and Whites Think and Feel About the American Obsession* 268 (1992) ("I'm driving with my nine-year-old boy. Here's a black guy crossing the street. A street-looking guy. He breaks into a fast run to make the traffic, and my nine-year-old says, 'Looks like he's running from the police.'").

78. See Barbara J. Gazeley, *Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases*, 33 Willamette L. Rev. 605, 621 (1997) ("Sexual harassment law remains a work in process.").

79. See 1 National Jury Project, Inc., *supra* note 9, § 2.06, at 2-43 to 2-57.

80. See Lawrence M. Friedman, *Crime and Punishment in American History* 4-5 (1993) (discussing how social judgments about crime are made). As Friedman notes:

"Society" is another abstraction; what we mean is that these are collective decisions. Not everybody is part of the collective that makes the decision. When we say "society" we really mean those who call the tunes and pay the piper; it would be worse than naive to imagine that everybody's opinion counts the same, even in a country that is supposed to be democratic. . . . The rich and powerful, the articulate, the well positioned, have many more "votes" on matters of definition than the poor, the weak, the silent.

Id.

81. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 70 (1992) (Scalia, J., dissenting) ("In the interest of promoting the supposedly greater good of race relations in the society as a whole . . . we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair.").

never happens,⁸² but there are times when individual justice leads to social justice.⁸³

It may also be in keeping with a broad notion of social justice—it may be doing the right thing—to choose the individual dignity of an accused⁸⁴ over the individual dignity of a prospective juror. The accused has absolutely everything on the line: his or her freedom, reputation, and, in a rapidly growing number of cases, his or her life. Even if we concede that a prospective juror has some kind of dignity interest, how can this interest compare to that of the accused? However insulted or diminished a prospective juror might feel as a result of not being selected for a jury on account of race or gender, it is a fleeting experience compared to that of the accused.⁸⁵ In the end, the rejected juror at least gets to go home.⁸⁶

Let me be clear. I am not suggesting that *Batson* be overruled. I believe *Batson* is good law and, when decided, was a marked improve-

82. See Mark Tushnet, *The Constitution from a Progressive Point of View*, in *A Less Than Perfect Union* 40, 47-49 (Jules Lobel ed., 1988) (suggesting that the protections provided by the Bill of Rights were more "aspirational" than actual). For a brilliant exposé of the fragility of the freedoms guaranteed by the Bill of Rights, see Richard Harris, *Freedom Spent* (1976).

83. For an example, see Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 *Fordham Urb. L.J.* 567, 571 (1992) (describing *State v. Wanrow*, 559 P.2d 548 (Wash. 1977), which held that jury instructions using only the masculine tense implicitly violated the female defendant's equal protection rights, as a "pivotal advance for women in the context of self-defense cases").

84. As Monroe Freedman has repeatedly noted, the bedrock concern of a zealous, devoted criminal lawyer is the client's dignity. See Freedman, *Understanding Lawyers' Ethics*, *supra* note 22, at 6-10, 13-17, 43-64. In jury selection, the peremptory challenge enhances a defendant's dignity by allowing the defendant to believe that his or her case is being tried by an impartial jury. See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (remarking that "the peremptory satisfies the rule that 'to perform its high function in the best way justice must satisfy the appearance of justice'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))); *Babcock, Voir Dire*, *supra* note 7, at 552.

85. See Smith, *Rosie O'Neill Goes to Law School*, *supra* note 18, at 43-45 (rejecting David Luban's view that it causes more harm to allow a rape complainant to be sexually ridiculed than to allow a wrongful rape conviction). Just as I believe there is "no comparison between being called a whore and being imprisoned for ten years for something you didn't do," *id.* at 45, I think there is no comparison between feeling bad about not being selected to serve on a jury and being convicted by a hostile or biased jury. But see Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 *Colum. L. Rev.* 725, 727 (1992) ("The American jury is universally understood as an important institution of democratic government. Exclusion of any person from such an institution by reason of race does violence to centrally important constitutional ideals In this respect, exclusion of jurors is like exclusion of voters . . ."); cf. John Guinther, *The Jury in America* at xiii (1988) (noting that Thomas Jefferson once declared the right to a jury trial "more precious to the maintenance of a democracy than even the vote").

86. For a thoughtful discussion of peremptory challenges and the roles of the jury as both a social institution and the protector of parties' rights, see Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 *Tex. L. Rev.* 1041 (1995).

ment over what preceded it.⁸⁷ I believe that the requirements of *Batson* are consistent with a prosecutor's "uniquely high standard of conduct"⁸⁸ in criminal trials, and the obligation to seek justice, not convictions.⁸⁹ The problem with *Batson* is that it is so easily overcome by prosecutors.⁹⁰

87. But see Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 Md. L. Rev. 107, 127 (1994) [hereinafter Brown, *The Role of Race*] (criticizing *Batson* for recognizing that race makes a difference and then denying litigants the opportunity to strike a prospective juror based upon racial bias); Ogletree, *Just Say No*, *supra* note 42, at 1100-13 (discussing the ways in which *Batson* is routinely undermined).

88. *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

89. See *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."); Model Code of Professional Responsibility EC 7-13 (1969); Standards Relating to the Admin. of Criminal Justice Standard: The Prosecution Function § 1.1(c) (1974).

90. See Kennedy, *supra* note 25, at 208-14 (noting the enormous deference judges give to prosecutors when enforcing *Batson*, and citing examples of "blatant lying" by prosecutors and "fudging" by both prosecutors and judges); Brand, *supra* note 56, at 583-96 (examining *Batson*'s inability to identify or eliminate race-based challenges); Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 459 (1996) (finding that, between 1986 and 1993, there were 165 cases in which judges ruled that prosecutors had violated *Batson*, approximately 10% of the 1101 cases brought by criminal defendants alleging the racially motivated prosecutorial exercise of peremptory challenges); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DePaul L. Rev. 625, 629-35 (1994) (reporting post-*Batson* cases in which prosecutors successfully asserted nonracial grounds for peremptories); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J. L. Reform 229 (1993); Gordon, *supra* note 44, at 693-709 (examining examples of pretext in the proffered reasons for peremptory challenges under *Batson*). For a judicial perspective on the lackluster enforcement of *Batson* by trial courts, see *United States v. Clemmons*, 892 F.2d 1153, 1159, 1163 (3d Cir. 1989) (Higginbotham, J., concurring) ("I have been disturbed . . . by a series of other cases where the *Batson* issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted [C]ourts must take seriously our responsibility[ies] [under *Batson*]).

Some prosecutors apparently conduct training sessions on how to circumvent *Batson*. The disclosure of a videotaped training session in which a senior Philadelphia prosecutor—who was running for District Attorney—urged his younger colleagues to exclude jurors on the basis of race, class, and educational stereotypes caused a public scandal. See Michael Janofsky, *Under Siege, Philadelphia's Criminal Justice System Suffers Another Blow*, N.Y. Times, Apr. 10, 1997, at A14 (discussing the revelation that a former Philadelphia prosecutor running for District Attorney trained other prosecutors to exercise race-based peremptory challenges). It is not at all clear that the former prosecutor was acting unethically. Compare Stuart Taylor, Jr., *Selecting Juries; Dumb and Dumber*, Legal Times, Apr. 14, 1997, at 33 ("McMahon's video suggests that in Philadelphia, at least, some prosecutors think . . . that they could get away with cynically circumventing *Batson*"), with Michael Matza, *Jury's Out on Whether Ethics Were Violated*, Phila. Inquirer, Apr. 2, 1997, at 1 (finding a range of opinions on the ethics of training prosecutors to consider race in jury selection), and Michael Matza & Mark Fazlollah, *Juries and Justice*, Phila. Inquirer, Apr. 6, 1997, at

I take issue with *McCullum*, which I believe was wrongly decided.⁹¹ Not only do I share the view of the dissenters that it is absurd to characterize the conduct of a criminal defendant as "state action,"⁹² but I believe that limiting a defendant's use of peremptory challenges often leads to less, not more, racially diverse juries.⁹³ As the NAACP Legal Defense and Educational Fund explained in its amicus brief in *McCullum*:

The ability to use peremptory challenges to exclude majority race jurors may be crucial to empanelling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.⁹⁴

E1 (quoting the former prosecutor as saying that the techniques he recommended were "realistic" not "racist").

91. See *McCullum*, 505 U.S. at 62-69 (O'Connor, J., dissenting); Michael J. Desmond, *Limiting a Defendant's Peremptory Challenges: Georgia v. McCollum and the Problematic Extension of Equal Protection*, 42 Cath. U. L. Rev. 389 (1993).

92. See 505 U.S. at 69-70 (Scalia, J., dissenting) (characterizing the assertion that "[a] criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state" as absurd); *id.* at 63-68 (O'Connor, J., dissenting) (critiquing the idea that defendants or defense lawyers are state actors).

93. See *id.* at 68 (O'Connor, J., dissenting) (disputing the notion that "leaving criminal defendants and their attorneys free to make racially motivated peremptory challenges will undermine the ideal of nondiscriminatory jury selection . . ."). As Justice O'Connor wrote:

Considered in purely pragmatic terms . . . the Court's holding may fail to advance nondiscriminatory criminal justice. It is by now clear that conscious and unconscious racism can affect the way white jurors perceive . . . the verdict of guilt or innocence Using peremptory challenges to secure minority representation on the jury may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury. . . . In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions.

Id. at 68-69 (O'Connor, J., dissenting); see also *id.* at 62 n.2 (Thomas, J., concurring) (noting that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors") (citing Brief for NAACP Legal Defense and Educational Fund, Inc. as amicus curiae 3-4, *McCullum* (No. 91-372)).

Professor Sheri Johnson notes that "it is a strange case that makes Justices O'Connor and Thomas the champions of defendant rights and the purveyors of discussion about unconscious racism." Johnson, *Language and Culture*, *supra* note 47, at 51. She agrees that it would be most beneficial for African American defendants and defendants generally if Batson were law and *McCullum* had been decided differently. See *id.*

94. *McCullum*, 505 U.S. at 69 (O'Connor J., dissenting) (citing Brief for NAACP Legal Defense and Education Fund, Inc., at 9-10, *McCullum* (91-372)). Importantly, while Justice O'Connor cites with approval the amicus brief of the LDF, she does not explicitly endorse the LDF position that black defendants should not be prohibited

In other words, when criminal defendants, a disproportionate number of whom are poor and nonwhite, exercise peremptory challenges with race in mind, they may be doing so for strategic reasons, not bigoted ones.⁹⁵ Exercising peremptory challenges in a race-conscious manner does not necessarily mean exercising challenges in a racist manner.⁹⁶ Striking members of the majority race on behalf of a minority accused may also be a form of "affirmative action"⁹⁷ in view

from using race-based peremptory challenges even if white defendants are prohibited. See Kennedy, *supra* note 25, at 216-18; see also *id.* at 216 (noting the "fascinating and unlikely alliance between Justice Sandra Day O'Connor, Justice Clarence Thomas, and the NAACP Legal Defense and Educational Fund" on the question of peremptory challenges by minority defendants).

Kennedy derides the rhetoric employed by LDF to support its position as "sentimental obfuscation." *Id.* at 220. He argues that the black defendant who exercises peremptory challenges to exclude whites in the hope of obtaining blacks on the jury is not doing so "in order to empanel a fair jury or to enlarge opportunities for blacks to participate in self-government through jury service . . . [but] because . . . that strategy will give him a better chance of escaping conviction." *Id.* Kennedy further argues further that to allow black and not white defendants to make racially motivated peremptory challenges will lead to the same "difficulties, misunderstandings, resentments, and countermobilizations that all other race lines have encountered." *Id.* at 227.

As I indicate in part I, I do not share LDF's position that only black defendants should retain a right to the unfettered exercise of peremptory challenges. See *supra* Part I. I believe all defendants should retain this right.

95. See Kennedy, *supra* note 25, at 218 (commenting on the notion of "strategic as opposed to prejudiced racial discrimination" in jury selection). As Professor Kennedy notes:

It is simplistic to believe . . . that racially discriminatory peremptory challenges merely reflect prejudice, animosity, or unthinking habit. Bigotry or reflexive allegiance to certain stereotypes surely explains why some attorneys racially discriminate in their use of peremptory challenges. On the other hand, many attorneys, prosecutors as well as defense counsel, racially discriminate in their deployment of peremptory challenges because they reasonably believe that doing so redounds to the benefit of the side they represent.

Id.

96. See J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. Cal. L. Rev. 1015, 1021-37 (1990) (arguing for restricting racist peremptory challenges by defendants).

97. See Abramson, *supra* note 7, at 102 (discussing the notion of affirmative action in jury selection); see also Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. Rev. 707 (1993) [hereinafter King, *Racial Jurymantering*] (discussing a number of race-conscious procedures to ensure minority representation in juries and jury pools); cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (discussing the difference between government policies that seek to benefit minorities and those that seek to maintain or perpetuate inequality). As Justice Stevens wrote:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.

Id. (Stevens, J., dissenting).

of the historical exclusion of African Americans from juries,⁹⁸ and in view of what many regard as the overincarceration of African Americans today.⁹⁹

Thus, from an ethical and institutional perspective, the new ethics of jury selection do little to enhance the way law works for those called to sit in judgment of the accused, who are not especially ennobled by the concept of "race blindness," and do even less for the accused, who may well end up with a hostile jury. I now evaluate whether there is some empirical basis to believe that race and gender have nothing to do with being fair and impartial jurors.

III. THE NEW ETHICS AND JURY RESEARCH AND EXPERIENCE

The outcome of any jury trial is the collective judgment made by twelve individuals. Each person's attitudes, opinions, and experiences will affect the ways in which that individual evaluates a case and arrives at a decision.

—National Jury Project, Inc.¹⁰⁰

Race matters.

—Cornel West¹⁰¹

We know that like race, gender matters.

—Sandra Day O'Connor
in *J.E.B. v. Alabama ex rel. T.B.*¹⁰²

98. See King, *Racial Jurymantering*, *supra* note 97, at 712-19 (discussing the reasons why minorities have historically been and still are underrepresented on criminal juries).

99. See Marc Mauer, *The Sentencing Project, Young Black Men and the Criminal Justice System: A Growing National Problem* 9 (1990) (indicating that, in 1989, there were more young African American men under the supervision of the criminal justice system than there were African American men of all ages enrolled in higher education); Mauer & Huling, *supra* note 75, at 3 (finding that nearly one in three young black men are either in jail or prison or on probation or parole); National Center on Institutions and Alternatives, *Hobbling a Generation: Young African American Males in Washington, D.C.'s Criminal Justice System: Five Years Later* 1 (1997) (finding that one out of two young African American men living in Washington, D.C. are under the supervision of the criminal justice system); see also Butler, *supra* note 72, at 1280-82 (discussing the enormous social costs of the overincarceration of African Americans and disputing the argument that disproportionate black incarceration is the result of disproportionate black criminality).

100. 1 National Jury Project, Inc., *supra* note 9, § 1.03, at 1-7.

101. Cornel West, *Race Matters* 4 (1993) ("There is no escape from our interracial interdependence, yet enforced racial hierarchy dooms us as a nation to collective paranoia and hysteria—the unmaking of any democratic order.").

102. 511 U.S. 127, 148 (1994) (O'Connor, J., concurring); see also Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 128-50 (1982) (finding that women and men have different ethical systems arising from their different experiences and perspectives).

If race and gender significantly influence a prospective juror's attitudes and life experience, then a defense lawyer who is appropriately concerned about his or her client would be wise to take these factors into consideration when selecting a jury. They might not be the only factors to consider, but, if they indeed matter, it would be foolish to fail to consider them. It would be bad lawyering; indeed, it would be unethical defense lawyering.¹⁰³

Studies on jury decision-making and the influence of race, gender, and ethnicity¹⁰⁴ are admittedly problematic. Some studies are better than others. Most can be criticized for one failing or another.¹⁰⁵ If the

103. See sources cited *supra* note 22.

104. I do not explicitly include ethnicity or class in this article for two reasons. First, *Batson* has not yet been extended to prohibit peremptory challenges based on these categories. Second, I believe that ethnicity and class are less discernable than race and sex (even though race and sex can themselves be complicated) and, therefore, less influential. See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1697 (1985) [hereinafter Johnson, *Black Innocence*] ("Ethnicity, unlike race, is most often not apparent to jurors, and thus usually could not be the basis for distortion of judgment. More significantly, the empirical evidence provides no support for the claim that ethnicity alters the attribution of guilt.").

Sheri Lynn Johnson's excellent article, see Johnson, *Black Innocence*, *supra*, on which I have relied extensively, has been called "the most detailed recent analysis of the effect of race on criminal jury decisionmaking." Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 Behav. Sci. & L. 179, 182 (1992). I share Professor Johnson's conclusion that the race of jurors and defendants matters in jury decisionmaking. See generally Johnson, *Black Innocence*, *supra*, at 1616-79 (discussing the influence of racial bias on the determination of guilt).

105. See Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 Ohio N.U. L. Rev. 229, 247-51 (1990) (criticizing several jury studies on the effect of race). But see Johnson, *Black Innocence*, *supra* note 104, at 1617-18 (concluding that, while any one jury study might have its shortcomings, when one looks at a range of jury studies and general social psychology research it is clear that race influences some jury verdicts); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 129-30 (1993) [hereinafter King, *Postconviction Review of Jury Discrimination*] ("Jury studies belie declarations that the effects of jury discrimination on jury decisions are insignificant or unknowable."). See generally Abramson, *supra* note 7, at 143-76 (critiquing social science research on the effect of juror demographics on evaluation of evidence and decision-making).

There are three types of research that pertain to the significance of race and gender in jury decisionmaking: mock jury experiments and questionnaires based on case descriptions; observations and statistics from real trials ("archival research"); and general research on prejudice. See Johnson, *Black Innocence*, *supra* note 104, at 1617-18; see also King, *Postconviction Review of Jury Discrimination*, *supra*, at 75-77 (discussing studies that examined the influence of juror discrimination on jury decisions).

In mock jury experiments and questionnaires, researchers attempt to simulate trials by presenting participants with evidence and asking them to make a determination regarding guilt, while controlling and altering variables such as the nature of the charges, the strength of the evidence, and the race or sex of defendants. Some criticize these studies as having little application in the real world. See, e.g., King, *Postconviction Review of Jury Discrimination*, *supra*, at 75-77 (discussing the significance of differences between mock juries and real juries, including the lack of group delibera-

methodology used is a mock jury, then it can always be said that the experience of being a mock juror is like having "jury experience lite." Whether the jury is mock or real, the studies depend on the candor and self-knowledge of the responding jurors.¹⁰⁶ Whether mock or real, the influence of race or gender is hard to tease out from a range of other significant factors, including the strength of evidence, the talent of the lawyers, the evidentiary rulings and legal instructions of the judge.¹⁰⁷

tion, the lack of live testimony, and the predominance of college students on mock juries); see also Ramsey McGowen & Glen D. King, *Effects of Authoritarian, Anti-Authoritarian, and Egalitarian Legal Attitudes on Mock Juror and Jury Decisions*, 51 Psychol. Rep. 1067, 1072 (1982) (finding that "juries render more moderate decisions than do individual jurors"); Peter J. Nelligan, *The Effects of the Gender of Jurors on Sexual Assault Verdicts*, 72 Soc. & Soc. Res. 249, 249-50 (1988) (stating that "the number of male and female jurors on rape-case juries is unrelated to the juries' propensity to convict"). Others point out that the absence of a voir dire process itself poses a significant threat to validity. See Nelligan, *supra*, at 249-50. But see Johnson, *Black Innocence*, *supra* note 104, at 1640-43 (persuasively arguing that mock jury studies have real world validity).

In archival studies, researchers survey jurors at the conclusion of the case in which they were involved or examine already collected data in an attempt to connect certain juror characteristics with the outcome of a trial. See Fulero & Penrod, *supra*, at 229, 249; Johnson, *Black Innocence*, *supra* note 104, at 1618. Archival research has been criticized for lacking control over potentially significant variables. See Johnson, *Black Innocence*, *supra* note 104, at 1618, 1643. Archival research has also been criticized for distorting effects in certain types of cases. See Fulero & Penrod, *supra*, at 249. They also tend to be older and fewer in number (this author mostly encountered studies from the 1970s and earlier), and may not shed much light on juror attitudes today.

General research on racial and gender prejudice tends to be dismissed as "soft" social science and as having little relevance in the context of jury service. See Johnson, *Black Innocence*, *supra* note 104, at 1643 (noting that general research on racial prejudice cannot substitute for a more specific inquiry into the effects of racial bias on a criminal jury). Still, this research supports the validity of the mock jury studies that demonstrate a connection between the race of juror, race of defendant, and attribution of guilt. See *id.* at 1643-44.

106. See Abramson, *supra* note 7, at 150-51.

107. See *id.* at 145-46. Professor Abramson does not believe that race or gender are good predictors of anything in the complicated context of a jury trial:

My conclusions about this science of jury selection will be straightforward. Empirically, there is no evidence that it works. There is no scientific way to predict whether an individual juror will conform, in any one case, to the general attitudes of his or her group. Moreover, even generalizations about groups are of limited use in the jury context, because the behavior of jurors, as well as the local community from which they are drawn, is so specific to the particular case on trial. In the end, we all belong to so many overlapping groups that science cannot forecast whether a juror will respond to the evidence more, as say, a woman, a white, a thirty-year-old, a Lutheran, a Norwegian, a college graduate, a member of the middle class, a Republican, or whatever.

Id. (citation omitted); see also Walter F. Abbott, *Surrogate Juries* 2 (1990) (asserting that the "overwhelming majority of jury verdicts is decided by the direction and strength of the evidence and not by personal characteristics of triers-of-fact"); Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (1966) (concluding, tentatively, that juries usually understand the facts and issues in cases); Shari Seidman Diamond, *Sci-*

Drawing meaningful conclusions about jury selection from trial experience is equally problematic. Criminal trial lawyers, indeed, all trial lawyers, often spout all sorts of theories about how to pick a jury.¹⁰⁸ To them, it does not seem to matter that the theories are little more than a combination of "intuition" and demographic stereotyping and that the outcome of the trial or trials on which the theories are based may have had little to do with either.¹⁰⁹ The outcome of a trial

entific Jury Selection: What Social Scientists Know and Do Not Know, 73 *Judicature* 178, 182 (1990) ("The focus on [scientific jury selection] neglects the key determinant of trial outcomes: the evidence. In studies that have measured the contributions of juror characteristics and trial testimony to jury verdicts, the trial testimony dominates.").

108. See Fulero & Penrod, *supra* note 105, at 230-37 (cataloguing juror "types" by occupation, gender, race or ethnicity, demeanor and appearance, religion, marital status, and age); see also Michael Fried et al., *Juror Selection: An Analysis of Voir Dire*, in *The Jury System in America: A Critical Overview* 47, 49 (Rita James Simon ed., 1975) (providing a "theoretical framework within which to understand the conflicting aims of prosecution and defense during voir dire").

109. See Abramson, *supra* note 7, at 146 ("Fascination with the supposed secrets of jury selection is hardly new in the United States. Lawyers have always relied on hunches, intuition, and their ideas about stereotypes to distinguish prosecution jurors from prodefense jurors." (footnote omitted)); Fulero & Penrod, *supra* note 105, at 237 ("Despite the conflicts in advice, . . . the fact that the advice is often based on racial, sexual, ethnic, or other stereotypes, and . . . that the advice is based on the idiosyncratic experiences of the advisors rather than on more reliable forms of data, this . . . advice appears to have enduring currency . . ."); see also Morton Hunt, *Putting Juries on the Couch*, N.Y. Times, Nov. 28, 1992, Magazine, at 70 (quoting Harvard Law Professor Alan Dershowitz: "Lawyers instincts are often the *least* trustworthy basis on which to pick jurors. All those neat rules of thumb, but no feedback. Ten years of accumulated experiences may be 10 years of being wrong.").

For the most notorious example of demographic stereotyping as a theory of jury selection, see Darrow, *supra* note 2. Darrow offers this advice on picking a criminal jury:

You would be guilty of malpractice if you got rid of [an Irishman], except for the strongest reasons.

An Englishman is not so good as an Irishman, but still, he has come through a long tradition of individual rights, and is not afraid to stand alone; in fact, he is never sure that he is right unless the great majority is against him. The German is not so keen about individual rights except where they concern his own way of life If he is a Catholic, then he loves music and art; he must be emotional, and will want to help you

If a Presbyterian enters the jury box and carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave Get rid of him with the fewest possible words before he contaminates the others

If possible, the Baptists are more hopeless than the Presbyterians

The Methodists are worth considering; they are nearer the soil

Beware of the Lutherans, especially the Scandinavians; they are almost always sure to convict

As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don't ask them too many questions; keep them anyhow, especially Jews and agnostics

Never take a wealthy man on a jury. He will convict, unless the defendant is accused of violating the anti-trust law

Id. at 37, 211-12.

can be traced to so many factors: the strength of evidence, the lawyers' ability, the judge's rulings, and simple luck.

Still, there is something to be learned from research and experience. Effective and ethical lawyers should not keep their heads in the sand. Much of what is known is consistent with common sense.

A. Jury Research on Race and Gender

Although many find it troubling, and it is certainly contrary to the idea of America as a melting pot, group identity is very strong in this country.¹¹⁰ This is especially true when it comes to race.¹¹¹ The question is whether racial identity and its concomitant suspicions, stereotypes, fears, and prejudices about those who are "different"¹¹² influence people when they sit on juries.

It seems impossible for this not to be so.¹¹³ If racial identity and racial prejudice¹¹⁴ are as strong as they appear to be in the world, how can they suddenly disappear in a courtroom?¹¹⁵ A juror's pledge to

110. See generally Eliot R. Smith & Diane M. Mackie, *Social Psychology* 169-263 (1995) (discussing the formation of group stereotypes and group identities). As a way of organizing and understanding the world, we all categorize people based on socially relevant characteristics such as race, gender, and ethnicity. This categorization leads us to exaggerate both the similarities within groups and the differences among them. See *id.* at 175-76.

111. See generally Terkel, *supra* note 77 (examining race through the comments and experiences of Chicago residents). The idea that racial identity significantly influences juror decision-making is threatening to many. See Hunt, *supra* note 109 (remarking that the notion that race predisposes us to decide criminal cases in a certain way threatens "our most cherished beliefs concerning the freedom of choice, the nature of reasoning and the quality of justice dispensed by jury trials").

112. See generally Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) (offering an introduction to the legal treatment of difference in a variety of contexts).

113. See Anna Quindlen, *Across the Divide, in Thinking Out Loud* 21, 22 (1993) (noting that the members of the all-white jury who decided the state prosecution of the officers in the Rodney King case "walked into that room with the baggage most [whites] carry, the baggage of stereotypes and ignorance and pure estrangement from African-Americans").

114. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 333 n.62 (1987) (defining prejudice as "an attitude toward outgroups which refrains from reality-testing, not just because the mental effort is too much, but because the attitude itself fulfills a specific irrational function for its bearer" (citation omitted)).

115. See Johnson, *Black Innocence*, *supra* note 104, at 1644-45 (noting that there is vast empirical proof that whites continue to have negative stereotypes of blacks, including stereotypes of "dangerousness, unruliness, and criminal propensity"); see also Kennedy, *supra* note 25, at 12-17 (discussing the association of crime with blackness); Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769, 1776 (1992) (discussing the romanticized image of criminals among some young rap stars that prompts emulation); cf. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Individuals are not expected to ignore as jurors what they know as men[] or women.").

One of the most famous studies demonstrating that most people tend to ascribe negative, indeed, criminal, behavior to blacks was by Gordon Allport, author of the

follow a judge's instructions and not let anything interfere with his or her duty to apply the law, no matter how genuine, simply cannot overcome more deep-seated and often unconscious beliefs and feelings.¹¹⁶

There are two critical findings pertaining to race and ethnicity that ought to inform criminal defense lawyers in selecting a jury. One is that in assessing legal responsibility, we tend to favor the groups to

classic book on prejudice. See Gordon W. Allport, *The Nature of Prejudice* (25th anniversary ed. 1990) (1954). In the study, Allport showed subjects a picture of several people in the subway, including a white man holding a razor and appearing to argue with a black man. Over half of the subjects reported that the black man held the razor. See Gordon W. Allport and Leo Postman, *The Psychology of Rumor* 111 (1965); see also Samuel L. Gaertner et al., *Race of Victim, Nonresponsive Bystanders, and Helping Behavior*, 117 J. Soc. Psychol. 69 (1982) (finding that white subjects in the presence of passive bystanders helped black emergency victims less quickly than white emergency victims); Johnson, *Black Innocence*, *supra* note 104, at 1645, n.162 (finding that when white children between eight and ten years of age were shown photographs of black and white men and were asked to select the "murderers" among them, they primarily selected photographs of black males).

Although many believe that white Americans have become substantially more tolerant and liberal with regard to race in the past several decades, the reality is that racist attitudes persist but in a more subtle and insidious form. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism, in Prejudice, Discrimination, and Racism*, *supra* note 10, at 61, 61-89 (discussing "aversive racism" as a conflict between egalitarian values and "unacknowledged negative feelings and beliefs about blacks"); see also Neil A. Rector, et al., *The Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings*, 133 J. Soc. Psychol. 651, 658 (1992) (stating that prejudicial perceptions affect jury decision-making). This new form of racism has been called "aversive racism." Gaertner & Dovidio, *supra*, at 61. In contrast to the more traditional, "dominative" racist, who acts out his or her bigotry in an openly hostile way, aversive racists "sympathize with the victims of past injustice; support public policies that, in principle, promote racial equality and ameliorate the consequences of racism; identify more generally with a liberal political agenda; regard themselves as nonprejudiced and nondiscriminatory; but, almost unavoidably, possess negative feelings and beliefs about blacks." *Id.* at 62. Aversive racists, all of whom would easily survive a cause challenge based on racial attitudes during voir dire, would not manifest their racism in outright hostility or hate. Instead, underlying their decisionmaking in matters involving race would be "discomfort, uneasiness, disgust, and sometimes fear[.]" *Id.* at 63; see also Nickerson et al., *supra* note 10, at 255 ("Within the American courtroom, individual, institutional, and cultural forms of racism can produce unjustly severe consequences for minority defendants.").

116. See Johnson, *Black Innocence*, *supra* note 104, at 1679 (noting that jurors often do not comprehend or heed jury instructions in the first place, and pointing out that if, for most jurors, race prejudice is largely unconscious, instructing them to put it aside is not terribly productive); see also Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016, 1027-28 (1988) (stating that, although racism may be expressed "indirectly, covertly, and often unconsciously," it is still a pervasive part of who Americans are); Rector et al., *supra* note 115, at 658 (stating that "prejudicial perceptions of the defendant and victim influence juror decisions").

which we belong.¹¹⁷ The other is that there is a strong correlation between race and attitudes about policing.¹¹⁸

It is generally acknowledged that we tend to favor members of our own racial or ethnic group over those of other groups.¹¹⁹ Because an important part of identity is group membership, and because people like to feel good about themselves, we tend to perceive the groups to which we belong in positive terms.¹²⁰ Consistent with the comparative nature of most evaluations, when we attribute an elevated stature to our own groups, we tend to attribute a lower one to other groups.¹²¹ Some researchers have found that "ingroup bias," favoring members of one's own group, is greatest in members of disadvantaged groups.¹²² This is especially so when the lower status is seen as unde-

117. See Dolores Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. Applied Soc. Psychol. 1249, 1251-56 (1993). Sheri Lynn Johnson refers to this as "own-race favoritism" and "other-race antagonism." Johnson, *Black Innocence*, *supra* note 104, at 1617; see also Smith & Mackie, *supra* note 110, at 199-203 (finding that we tend to look for behavior that confirms the validity of our stereotypes and ignore or minimize behavior that is contrary to already formed views).

118. African Americans experience the criminal justice system in a very different way than whites. This different experience is reflected in attitudes about law enforcement generally and the police particularly. See The Gallup Organization, *Gallup Poll Social Audit: Black/White Relations in the United States 1997*, at 11 (1997) (finding that 60% of African Americans believe that police treat them less fairly than whites); Charles J. Ogletree et al., *Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities 7-8* (1995) [hereinafter Ogletree et al., *Beyond the Rodney King Story*] (discussing the different views regarding the effectiveness of law enforcement held by whites, blacks and Hispanics); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 Harv. L. Rev. 1306, 1313 (1998) (reviewing Randall Kennedy, *Race, Crime, and the Law* (1997)) (noting that studies and polls show that white jurors tend to credit police officers' testimony, while nonwhite jurors tend to approach police testimony with skepticism); *Black and White in America*, Newsweek, Mar. 7, 1988, at 18, 23 (reporting poll results indicating that blacks believe themselves to be more harshly treated by the criminal justice system than whites do); *Crime, Cops, and Courts*, Pub. Pers., July/Aug. 1991, at 74, 74 (reporting the results of polls showing that blacks and whites have markedly different views of the prevalence of the use of force by police officers); Janet Elder, *Trial Leaves Public Split on Racial Lines*, N.Y. Times, October 2, 1995, at B9 (reporting that 65% of whites expressed confidence in their local police compared to 37% of blacks, and 71% of whites had confidence in the criminal justice system compared to 52% of blacks); Maria Puente, *Poll: Blacks' Confidence in Police Plummets*, USA Today, Mar. 21, 1995, at 3A (reporting that only 33% of blacks believe that police testify truthfully, and only 18% of blacks say they would believe police over other witnesses at a trial).

119. See Deidre Golash, *Race, Fairness, and Jury Selection*, 10 Behav. Sci. & L. 155, 173 (1992); David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in *Prejudice, Discrimination, and Racism*, *supra* note 10, at 127, 130-31; Perez et al., *supra* note 117, at 1251; cf. Mary A. Newman et al., *Ethnic Awareness in Children: Not a Unitary Concept*, 143 J. Genetic Psychol. 103, 109 (1983) (demonstrating that children prefer pictures of same-race children, with this tendency especially strong in white children).

120. See Hamilton & Trolier, *supra* note 119, at 156.

121. See *id.*; see also Smith & Mackie, *supra* note 110, at 234 ("[E]steem, consideration, and favoritism await in-group members, whereas disdain, discrimination, and domination are often the fate of those categorized as out-group members.").

122. See Shawn Meghan Burn, *The Social Psychology of Gender* 128 (1996).

served.¹²³ This would suggest that African Americans have a strong sense of empathy and connection with other African Americans—"same-race favoritism"—that might find expression on a jury.¹²⁴

With regard to attributions of guilt based on race, there seems to be a consensus that if the evidence is strong, the attitudes and biases of jurors are less important.¹²⁵ When the evidence is not as compelling—that is, when it is a close case and the jury could go either way—juror bias may well influence verdicts.¹²⁶

123. See *id.* (citing various studies).

124. The research on this is inconclusive. See Reid Hastie et al., *Inside the Jury* 128-29 (1983) (finding little if any correlation between race and pre-deliberation verdict choices); Saul M. Kassir & Lawrence S. Wrightsman, *The American Jury on Trial: Psychological Perspectives* 29-31 (1988) (assembling studies finding juror demographic traits unrelated to verdicts in any consistent manner); Rita J. Simon, *The Jury: Its Role in American Society* 45-46 (1980) (finding "only slight and not consistent differences in the verdicts [of] jurors with different class, ethnic, and sexual characteristics . . ."); John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 *Law & Hum. Behav.* 89, 95 (1980) (finding no apparent relationship between race and verdict choices); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 *Jurimetrics J.* 3, 16 (1976) (finding that the four best predictor variables, including demographics and attitudinal variables, accounted for less than 13% of verdict variance). But see Johnson, *Black Innocence*, *supra* note 104, at 1640 (citing empirical evidence to support the conclusion that "jurors . . . will tend to convict other-race defendants under circumstances in which they would acquit same-race defendants"); Sydney P. Freedberg, *Report Shows Race a Factor in Verdicts*, *Miami Herald*, May 11, 1984, at C1 (reporting that an archival study of the relationship between racial composition and verdicts in Dade County, Florida found that juries with at least one African American juror were less likely than all-white juries to convict African American defendants); *infra* notes 135-36 and accompanying text (discussing statistics that show a positive correlation between acquittal rates and the presence of minority jurors on juries).

125. See Perez et al., *supra* note 117, at 1258; see also King, *Postconviction Review of Jury Discrimination*, *supra* note 105, at 86 ("The assumption that juror race will have less influence on jury decisions when the evidence strongly supports guilt is consistent with the theory that explains how stereotypes and other cognitive biases operate as well as with the findings of most empirical studies." (footnote omitted)). There is also, however, some research to suggest that determinations about the strength of evidence are not entirely objective, and race and ethnicity play a role here, too. See Hepburn, *supra* note 124, at 98 ("Attitudes toward those issues which constitute the basis for the case and toward those social groups which testify during the trial influence one's perception of the strength of the evidence presented[.]"); King, *Postconviction Review of Jury Discrimination*, *supra* note 105, at 86 ("The inability of the strength of the evidence to account completely for the effect of juror race on verdicts may be due in part to the researchers' own race-based assessments of the strength of the evidence."); Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 *J. Experimental Soc. Psychol.* 133, 142 (1979) (finding that, unlike white subjects, black subjects tended to give a "black defendant the benefit of the doubt not only when the [prosecution's] evidence [was] doubtful but even when there was strong evidence against him"). This last finding tends to suggest that African Americans have the best understanding of the legal principles of burden of proof, proof beyond a reasonable doubt, and presumption of innocence. After all, these principles do not have less effect simply because the evidence is weighty.

126. See Ugwuegbu, *supra* note 125, at 143; see also Kalven & Zeisel, *supra* note 107, at 164-66 (positing a "liberation hypothesis," wherein evidence serves to release

There are many studies that suggest that white jurors attribute guilt to minority defendants more readily than to white defendants.¹²⁷ In her influential article, *Black Innocence and the White Jury*,¹²⁸ Sheri Lynn Johnson cites nine studies that found that the race of the criminal defendant was a critical factor in the determination of guilt.¹²⁹ White mock jurors in all of these studies were more likely to find a non-white defendant guilty than they were to find an identically-situated white defendant guilty.¹³⁰

If life experience is the most important factor in a juror's evaluation of evidence,¹³¹ and race is a significant and distinctive aspect of that experience, then the race of jurors may well influence their perception

jurors from their biases when it is strong, but allows them their biases when it is ambiguous).

127. See Kalven & Zeisel, *supra* note 107, at 208-13 (finding that black defendants were much less likely than white defendants to be the recipients of lenient verdicts based on sympathy); Rector et al., *supra* note 115, at 657 (finding that the "overall positive appeal of [a] defendant was found to be rated lower when he was presented as Black"); cf. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 Crime & Delinq. 563, 594 (1980) (finding that in Florida, Georgia, Ohio, and Texas, cases involving black offenders and white victims were the most likely to result in the death penalty). Unfortunately, there have been no recent studies like Kalven and Zeisel's classic one. Apparently, this is partly due to the reluctance of courts to allow direct and systematic inquiry concerning the content of jury deliberations. See Johnson, *Black Innocence*, *supra* note 104, at 1620.

128. See Johnson, *Black Innocence*, *supra* note 104.

129. See *id.* at 1626-36; see also *id.* at 1625 (observing that over one dozen mock jury studies support the hypothesis that racial bias is a factor in guilt determination, and that the few studies that initially support the hypothesis that racial bias is not a factor are, upon close examination, ambiguous).

130. See Henry Allen Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. Crim. L. Criminology & Police Sci. 411 (1961); Johnson, *Black Innocence*, *supra* note 104, at 1626; King, *Post-Conviction Review of Jury Discrimination*, *supra* note 105, at 82 (noting that researchers have found that "white jurors are more likely than black jurors to convict black defendants and are also more likely to acquit defendants charged with crimes against black victims"); see also Perez et al., *supra* note 117, at 1259 (finding that Anglo majority juries convicted Hispanic defendants more frequently than Anglo defendants under identical circumstances, but Hispanic majority juries did not differ in their conviction rates); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & Soc'y Rev. 587 (1985) (finding that white subjects tend to find African American defendants guilty significantly more often than white defendants in murder cases); Marvin E. Wolfgang & Marc Reidel, *Rape, Race and the Death Penalty in Georgia*, 45 Am. J. Orthopsychiatry 658 (1975) (showing that white mock jurors rate black defendants guilty more often than white defendants in rape and murder cases).

Professor Johnson also points to research showing a connection between the race of the victim and the race of the defense lawyer and verdicts. See Johnson, *Black Innocence*, *supra* note 104, at 1635-36. For research showing that black defendants are most often found guilty when the victim is white, see Radelet & Pierce, *supra*; Ugwuegbu, *supra* note 125, at 140; and compare Robert W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. Soc. Psychol. 627 (1993) (finding that participants in a mock jury were more likely to find a defendant guilty in an acquaintance rape case if the victim's race was different from the defendant's).

131. See 1 National Jury Project, Inc., *supra* note 9, § 2.04, 2-10 to 2-24.

of evidence.¹³² This is consistent with the work of "story model" theorists, who argue that jurors reconstruct legal facts as stories, "whose plausibility depends on understandings drawn from experience."¹³³ As W. Lance Bennett and Martha Feldman noted, "[J]urors who come from different social worlds may disagree about the meaning and the plausibility of the same stories."¹³⁴

132. See Brown, *The Role of Race*, *supra* note 87, at 122 (referring to differences in "interpretive (and intuitive) analysis"—including differences in "common sense, deep-seated hunches, and judgments"—as the product of different life experiences that "often arise from differences in race or gender"); see also Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 32 (1977). Van Dyke depicts the situation succinctly:

[A] white juror sitting in a jury box listening to the testimony of a black witness would sift and evaluate and appraise that testimony through a screen of preconceived notions about what black people are. . . . The black juror, because of more similar life experiences to the black witness would . . . appraise that testimony from a distinctively different vantage point

Van Dyke, *supra*, at 32 (citation omitted).

For studies on the effect of racial stereotypes on juror cognition, see, for example, Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. Personality & Soc. Psychol. 726 (1988):

Taken as a whole, the results of the present experiments provided substantial support for the idea that the activation of a social stereotype elicits a selective evidence-processing strategy on the part of decision makers. That is, evidence that corroborates the implications of the stereotype receives greater attention, elaboration, and rehearsal, whereas inconsistent evidence is neglected.

Id. at 734. Consider, as well, David L. Hamilton et al., *Stereotype-Based Expectancies: Effects on Information Processing and Social Behavior*, 46 J. Soc. Issues 35 (1990):

[S]tereotypes operate as a source of expectancies about what a group as a whole is like . . . as well as about what attributes individual group members are likely to possess Their influence can be pervasive, affecting the perceiver's attention to, encoding of, inferences about, and judgments based on that information.

Id. at 43. For additional material, see Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. Personality & Soc. Psychol. 871, 878 (1987) (observing that when test subjects were given a "complex information-processing objective" and a "relevant" stereotype, the test subjects used the stereotype to organize the information into a mental image of the defendant).

133. W. Lance Bennett & Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* 171 (1981). The "story model" posits that "jurors impose a narrative story organization on trial information, in which causal and intentional relations between events are central." Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. Personality & Soc. Psychol. 242, 243 (1986) (citations omitted). See generally Edwin Hutchins, *Culture and Inference: A Trobriand Case Study* 62-106 (1980) (analyzing the narrative technique by the parties in a land litigation case in Papua New Guinea); Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 Psychol. Bull. 246, 254-55 (1981) ("Evaluation for implications involves inferential processing to interpret the story events with respect to the overall plans, goals, intentions, and motivations of the principal participants.").

134. Bennett & Feldman, *supra* note 133, at 171. Bennett and Feldman write that:

In place of recognizing legitimate differences in the interpretation of social experience, jurors more often are compelled to regard unfamiliar story elements or dissonant interpretations as signs of guilt. When key elements in a

This may explain why, in some cities, when the number of African Americans on juries has been increased, there has been an accompanying decrease in conviction rates.¹³⁵ That majority black juries tend to acquit criminal defendants more than majority white juries is certainly something defense lawyers should consider.¹³⁶

Because minorities are more often victims of police misconduct¹³⁷ and discriminatory law enforcement,¹³⁸ they may well be more skeptical of police testimony than whites.¹³⁹ Black jurors may also have a different interpretation of certain evidence, based on their distinctive

case are anchored in different social worlds, defendants may be found guilty simply by reason of their social experiences and their communication styles.

Id. at 179.

135. See Van Dyke, *supra* note 132, at 33 (noting that, in 1969, when Baltimore jury commissioners switched from a jury selection method that yielded less than 30% black jurors to one that yielded 34% to 40% black jurors, the conviction rate dropped from almost 84% to less than 70%); *id.* at 35 (reporting that when Los Angeles County changed its jury selection system to include more black and Hispanic jurors, the percentage of convictions fell from 67% in 1969 to 47.2% in 1971); see also Johnson, *Black Innocence*, *supra* note 104, at 1622 ("[T]he statistics do suggest that, for whatever reason, minority race jurors may evaluate evidence differently than do white jurors."); Benjamin A. Holden et al., *Color Blinded? Race Seems to Play an Increasing Role in Many Jury Verdicts*, Wall St. J., Oct. 4, 1995, at A1 (indicating that in the Bronx, where juries are 80% black and Hispanic, the acquittal rate for black defendants was 48%, and the acquittal rate for Hispanic defendants was 38%, in Washington, D.C., where juries are 70% black and criminal defendants are 95% black, the acquittal rate was 29%, and in Detroit, where African Americans are the predominant members of juries, the acquittal rate was 30%, all of which are considerably higher than the 17% national acquittal rate for all defendants in criminal jury trials).

136. See Holden, *supra* note 135. But see Richard A. Boswell, *Crossing the Racial Divide: Challenging Stereotypes About Black Jurors*, 6 Hastings Women's L.J. 233, 237-38 (1995) (arguing that the "widely-held perception that jurors in the O.J. Simpson case were motivated by racial considerations rather than the evidence" and would likely acquit a black defendant is a particularly offensive form of "juror stereotyping").

137. See generally Ogletree et al., *Beyond the Rodney King Story*, *supra* note 118, at 29-44 (positing that minorities are subject to abuse by police officers).

138. See Kennedy, *supra* note 25, at 76-167; Butler, *supra* note 72, at 1275-82; see also John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 Am. J. Soc. 329, 352-53 (1982) (concluding that race and class inform perceptions of criminal injustice). The perception that there is a different legal system for blacks and the poor is long-standing. See National Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 183 (1968) (noting that the courts have lost the confidence of the poor).

139. See *Racial Divide Affects Black, White Panelists*, Nat'l L.J., Feb. 22, 1993, at S8. In 1992, telephone interviews of nearly 80 jurors who had served in civil and criminal trials across the nation were conducted. The results revealed that 42% of the white jurors interviewed said that, given a conflict of testimony between a police officer and a defendant, the police officer should be believed. Forty-eight percent disagreed, and 9% said they did not know. In contrast, only 25% of African American jurors who were interviewed thought that the police officer's testimony should be believed, while 70% disagreed. *Id.*; see also Jeff Rosen, *Jurymandering*, New Republic, Nov. 30, 1992, at 15, 16 (finding that black jurors in Washington, D.C. "have grown so mistrustful of [police] that even trivial inconsistencies in testimony are enough to convince them that the police are lying" and that "black jurors empathize with defendants of all races because they resent having been unfairly hassled by the police").

experience, than their white counterparts. For example, when a defendant flees the police, whites may assume (and may be instructed by the judge to legally infer) that this flight suggests consciousness of guilt.¹⁴⁰ African American and other minority jurors might attribute that same conduct not to the guilty conscience of the defendant, but rather to the defendant's fear of mistreatment at the hands of the police.¹⁴¹

There are studies that suggest that white jurors are more likely than African Americans to convict African American defendants charged with assaulting police officers.¹⁴² There is also wide support for the view that African American and white jurors react differently to evidence in cases involving violent confrontations between African Americans and the police.¹⁴³

The research on gender is less extensive and less conclusive.¹⁴⁴ We know at least two things of importance to criminal defense lawyers who intend to select the fairest possible jury: women participate less than men in jury deliberations,¹⁴⁵ and men and women evaluate evidence differently in cases that directly invoke gender stereotypes, especially sexual assault cases.¹⁴⁶ We do not know the extent to which

140. See, e.g., Criminal Jury Instructions for the District of Columbia 2.44 (4th ed. 1993) ("[Y]ou may consider flight or concealment as a circumstance tending to show feelings of guilt, and you may also consider feelings of guilt as evidence to show actual guilt . . .").

141. See, e.g., Boswell, *supra* note 136, at 239 ("[W]hile whites appear to believe that the police and judicial system operate fairly, African Americans do not. . . . [M]any whites do not perceive race relations as all that bad, while African Americans do.").

142. See J. L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 Law & Psychol. Rev. 103, 107-11 (1979).

143. See Minimizing Racism in Jury Trials: The Voir Dire Conducted by Charles R. Gary in *People of California v. Huey P. Newton* (Ann Fagan Ginger ed., The Nat'l Lawyers Guild 1969):

[T]he single most dominant factor from today's urban black experience that sets him apart from his white counterpart is contact with the police . . . [and it is] the chief complaint of all black communities, and resonant with overtones of brutality. This chief component of black experience, the white American, whether racist or not, does not and cannot share.

Id. at 10; see also Coramae Richey Mann, *Unequal Justice: A Question of Color* 133-35 (1993); George J. Church, *The Fire This Time*, Time, May 11, 1992, at 18, 22 (discussing a poll after the Rodney King verdict showing that 23% of whites, compared to 48% of blacks, "felt that in an everyday encounter with police they ran a risk of being treated unfairly").

144. See Fulero & Penrod, *supra* note 105, at 245-46.

145. See Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 Yale L.J. 593, 596 (1987) [hereinafter Marder, *Gender Dynamics*].

146. See generally Lorrie L. Luellig, *Why J.E.B. v. T.B. Will Fail to Advance Equality: A Call for Discrimination in Jury Selection*, 10 Wis. Women's L.J. 403, 420 (1995) (stating that a "correlation exists between a person's sex and the conclusion he or she would reach in a rape case"). There is also some evidence to suggest that gender makes a difference in battered women's self-defense cases. See *id.* at 423-27; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (noting that women are more likely to convict in rape cases and commenting that

women bring a "different voice"¹⁴⁷ or a distinct moral vision to criminal decision-making.¹⁴⁸

Studies have shown that women participate significantly less than men during deliberations.¹⁴⁹ One study revealed that male jurors made forty percent more comments than their female counterparts.¹⁵⁰ Although more talk does not necessarily make the talk more compelling, the study found that the sheer quantity of male jurors' comments gave it weight.¹⁵¹

Studies show that men are perceived by other jurors as more influential and active than female jurors, even when men and women participate at equal rates.¹⁵² Men tend to be elected foreperson more

"one need not be a sexist to share the intuition that . . . a person's gender and resulting life experience will be relevant to his or her view" in cases such as "sexual harassment, child custody, or spousal or child abuse"); Marilyn Kasian et al., *Battered Women Who Kill: Jury Simulation and Legal Defenses*, 17 Law & Hum. Behav. 289 (1993); Jeffrey Rosen, *Oversexed*, New Republic, May 16, 1994, at 12, 14 (citing jury consultant Marjorie Fargo, who believes that gender has a significant effect "in cases involving domestic violence, sexual assault, child abuse and obscenity," and claims that seven out of ten women are likely to be unfavorable to the defense in these cases).

147. Gilligan, *supra* note 102, at 149 (noting that "changes in women's rights change women's moral judgments").

148. See Forman, *supra* note 44, at 48-56 (discussing whether there is a difference between the way men and women engage in "moral analysis" and whether that difference is reflected in the jury process). Forman suggests that there is support for the notion that there are gender differences and that these differences are reflected on juries. See *id.* at 50-51.

If indeed women do speak in a "different voice" and bring a distinct vision to moral dilemmas, we should expect . . . that women will bring a different perspective to bear on the process of judging cases as jurors.

.....

Although no one has tested the applicability of Gilligan's theory to the jury process, there does exist empirical research regarding gender differences in attitudes of jurors, their perception of evidence, and their participation in deliberations.

Id.

149. See Laura Gaston Dooley, *Sounds of Silence on the Civil Jury*, 26 Val. U. L. Rev. 405, 407 (1991); Charlan Nemeth et al., *From the '50s to the '70s: Women in Jury Deliberations*, 39 Sociometry 293, 302 (1976) (stating that male jurors offered more suggestions, opinions, and information during deliberations); Fred L. Strodbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 Sociometry 3, 5 (1956) (finding that "men originate significantly more acts than women"); Marder, *Gender Dynamics*, *supra* note 145, at 594-99 (discussing gender and participation rates on juries).

150. See Marder, *Gender Dynamics*, *supra* note 145, at 596.

151. See *id.* at 596 n.18 ("How much is said . . . appears to be more important to the perception of leadership than what is said . . .") (quoting Lawrence J. Smith & Loretta A. Malandro, *Courtroom Communication Strategies* § 4.48, at 424 (1985)).

152. See Marder, *Gender Dynamics*, *supra* note 145, at 596 n.18; Nemeth et al., *supra* note 149, at 300-04; Strodbeck & Mann, *supra* note 149, at 10.

often than women,¹⁵³ and the foreperson plays a crucial role in determining the verdict.¹⁵⁴

There is an abundance of studies demonstrating a correlation between gender and decision making in a rape or sexual assault case.¹⁵⁵ Contrary to folklore suggesting that women are harder on other women when it comes to sexual conduct (as in rape cases where consent is at issue),¹⁵⁶ empirical studies demonstrate that women jurors are more likely to convict rape defendants than their male counterparts.¹⁵⁷ Studies also indicate that women jurors are less influenced

153. See B. Beckham & H. Aronson, *Selection of Jury Foremen as a Measure of the Social Status of Women*, 43 Psychol. Rep. 475, 476-77 (1978); Marder, *Gender Dynamics*, *supra* note 145, at 595 n.9. One mock jury study found that of 155 jury forepersons, 14 were women and 141 were men. In that study, women constituted 46% of the jurors but only nine percent of forepersons. See Beckham & Aronson, *supra*, at 477 tbl.1; see also Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts?*, 64 Judicature 22, 31 (1980) (noting that the "odds of females serving as jury fore[persons] . . . were only half [that of] males").

154. See Rita James Simon, *The Jury and the Defense of Insanity* 115 (1967) (stating that the mean participation rate of foreperson was 31.1% compared to 7.5% for other jurors); Marder, *Gender Dynamics*, *supra* note 145, at 595; Thomas Sannito & Edward Burke Arnolds, *Jury Study Results: The Factors at Work*, 5 Trial Dipl. J. 6, 7 (1982) (indicating that from 550 completed juror questionnaires, 79% of jurors described foreperson as either "talkative," "one of the most talkative," or "the most talkative" compared to other jurors).

155. See Lawrence G. Calhoun et al., *Social Perception of the Victim's Causal Role in Rape: An Exploratory Examination of Four Factors*, 29 Hum. Rel. 517, 523 (1976); James H. Davis et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1, 6 (1975); Marsha B. Jacobson, *Effects of Victim's and Defendant's Physical Attractiveness on Subjects' Judgments in a Rape Case*, 7 Sex Roles 247, 252-53 (1981) (finding that women were more likely to find a defendant charged with rape guilty and to recommend longer prison terms than men); Luellig, *supra* note 146, at 420-21 n.115 (citations omitted); Marder, *Gender Dynamics*, *supra* note 145, at 605 n.58; Michael G. Rumsey & Judith M. Rumsey, *A Case of Rape: Sentencing Judgments of Males and Females*, 41 Psychol. Rep. 459, 464 (1977) (finding that women tend to express greater certainty of guilt than men in rape cases whether the evidence is strong or more equivocal, while men tended to exculpate a defendant when the evidence was more equivocal by transferring part of the blame to the victim); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148-49 (1994) (O'Connor, J., concurring) ("A plethora of studies make clear that in rape cases . . . female jurors are somewhat more likely to vote to convict than male jurors." (citation omitted)). But see Nelligan, *supra* note 105, at 250 (examining 86 juries in rape cases and finding that the number of men and women on the juries was "unrelated to their propensity to convict or acquit"). Nelligan himself, however, expressed wariness about the results of his study: "[T]he results of this study should not be interpreted to suggest that gender composition of juries makes no difference and may be disregarded in the jury selection process." *Id.*

156. See, e.g., 3 Melvin M. Belli, *Modern Trials*, § 51.67-.68, at 446-47 (2d ed. 1982) ("A woman is inclined to forgive sin in the opposite sex, but definitely not her own . . ."); see also Martin Blinder, *Psychiatry in the Everyday Practice of Law* § 12.3, at 120 (3d ed. 1982) ("[T]he innate attraction between the sexes, with this initial, instinctual distrust between many women, makes them surprisingly good defense jurors in rape trials . . .").

157. See Marder, *Gender Dynamics*, *supra* note 145, at 605 n.58.

by a rape complainant's virginity or social status.¹⁵⁸ Women are also less persuaded by the range of myths about rape.¹⁵⁹ Men tend to identify more with the defendant and find the defendant's testimony more credible than do women jurors.¹⁶⁰

Racism is out there. Sexism is out there. They persist whether we want them to or not.¹⁶¹ The civil rights and women's movements brought gains, but real social change is a slow process. "Justice is a constant struggle."¹⁶² Lawyers, especially those defending the least powerful and most despised among us, should not pretend that the battle against racism and sexism has been won and that any twelve jurors will be fair and impartial in every case. They should not pretend that all prospective jurors will afford disproportionately poor, black defendants the legal protections to which they are entitled.

158. See Luellig, *supra* note 146, at 421-22 (finding that men are more likely than women to hold traditional views of sex roles in rape trials).

159. See Marder, *Gender Dynamics*, *supra* note 145, at 605.

160. See Luellig, *supra* note 146, at 421-22. Compare this trial's result:

In a celebrated case in Fort Lauderdale, Fla., in 1989, a jury acquitted a Georgia man on charges of abducting and raping a 22-year-old woman he had met in a parking lot. The acquittal came after the jurors were shown a lacy white miniskirt and bright green tank top that the woman wore on the night of the incident. After the trial . . . jury foreman Roy Diamond said, "We all feel she asked for it for the way she was dressed."

Peter Marks & Michele Ingrassia, *When the Rapist is Someone She Knows: Date Rape*, Newsday, July 21, 1991, at 4.

The above example brings to mind the William Kennedy Smith rape case, in which the complainant danced closely with Smith, kissed him in public, and accompanied him to his home after midnight. The author has always believed that a crucial problem for the prosecution was the fact that the complainant admitted to having taken off her pantyhose when she was with Smith. Although this is perfectly innocent conduct for a woman about to walk on a beach, the "panty" part of pantyhose is sexually suggestive. Had she been wearing socks, she probably would have been better off. Of course, the William Kennedy Smith case was complicated by many other issues, including the fame and attractiveness of the defendant, the credibility of a number of prosecution witnesses, and the relative skill of the lawyers. The jury may even have included an equal number of men and women. For a sample of interesting perspectives on the William Kennedy Smith case, see Ellen Goodman, *In Smith Trial's Aftermath, What Does It All Mean?: Overblown Case's 'Lessons' Overstated*, Palm Beach Post, Dec. 16, 1991, at A15 (stating that if the author, a feminist columnist, had been a juror, she would have acquitted Smith because the prosecution failed to prove its case beyond a reasonable doubt); Al Kamen & Ruth Marcus, *Experts Fault Prosecutor for Uninspired Performance in Tough Case*, Wash. Post, Dec. 12, 1991, at A22 (reporting widespread criticism of the prosecutor for her ineffectual cross-examination of the defendant); Catharine A. MacKinnon, *The Palm Beach Hanging*, N.Y. Times, Dec. 15, 1991, § 4, at 15 (describing the defense lawyer's tactics as "misogynist").

161. This also applies to the differences between many groups. See George P. Fletcher, *Political Correctness in Jury Selection*, 29 Suffolk U. L. Rev. 1, 13 (1995) [hereinafter Fletcher, *Political Correctness*] ("We should recognize that men and women are often different. Blacks, whites, and Asian-Americans are often different. Jews and Christians are often different. The European-born and American-born are often different.").

162. This is the slogan of the National Lawyers Guild.

B. Criminal Trial Experience Relating to Race and Gender

As far as I am able to ascertain, my own experience as a criminal trial lawyer is consistent with the social science research discussed above.¹⁶³ In the two cases I described in the beginning of this article, my understanding of the significance of race in American life and criminal trials informed every strategic decision, from jury selection through closing argument. Fortunately, this approach contributed to acquittals for both clients.

In the first case, in which my client was an African American charged with assaulting white police officers, the evidence against my client was fairly strong: the sworn testimony of two experienced police officers. There was virtually no chance of getting any African Americans on the jury, because of the jury pool in Middlesex County, Massachusetts. Notwithstanding our efforts to get just one African American on the jury,¹⁶⁴ we had an all-white jury. Perhaps I am overly pessimistic about the capacity of white jurors to discredit police testimony,¹⁶⁵ but I believe that Mr. Reed's impressive background (West Point, Harvard, his future professional ambitions, his lack of any criminal record), and the fact that we intentionally called many white character and fact witnesses, more white witnesses than African Americans, made a difference. Mr. Reed was not simply one more young black man charged with street violence. Who Mr. Reed was, and how we presented him, made him more palatable to the jurors, made him less a member of a "black outgroup," and put pressure on the all-white jury not to convict.¹⁶⁶

In the second case, in which my client was a white man accused of killing a homeless African American man, the evidence against my client was not so compelling, and we had a fairly strong case of self-defense. We also had a better chance here than in Cambridge of getting some people on the jury who were of the same race as my cli-

163. See *supra* Part II.

164. Studies show that one African American would not be enough to change the dynamics in deliberation. See Johnson, *Black Innocence*, *supra* note 104, at 1698 ("Twelve Angry Men to the contrary, jury dynamics research shows that a single dissenting juror virtually never succeeds in hanging a jury, let alone reversing its predisposition." (footnote omitted)). But cf. Jeffrey Rosen, *One Angry Woman*, New Yorker, Feb. 24 & Mar. 3, 1997, at 54, 54-59 (suggesting that in Washington, D.C., there is a growing phenomenon of lone African American women disregarding evidence in order to prevent convicting African American men). Although I have not practiced in the District of Columbia long, I have not observed what Rosen suggests is regularly occurring.

165. See Lawrence Vogelstein, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 Fordham Urb. L.J. 571, 573 (1993) ("The talented trial attorney is a student of human nature, all too often concentrating on its dark side.").

166. See *supra* note 117. We also made explicit reference to race—to the fact that our client was young and black and, notwithstanding his many accomplishments, was frequently stopped by the police simply because he was young and black—when our client testified and in closing argument.

ent,¹⁶⁷ but we wanted more than a token presence.¹⁶⁸ We worried that there would be strong feelings of same-race favoritism by African American jurors toward the decedent and a key prosecution witness, who, like the decedent, was homeless. We also worried that a largely African American jury might believe that an acquittal here, no matter how strong the evidence of self-defense, would devalue the life of an impoverished African American.¹⁶⁹

As a result of pure luck, the panel of prospective jurors that entered the courtroom on the first day of trial was "whiter" than the usual District of Columbia panels,¹⁷⁰ providing a better chance of securing whites on the jury. Using a race-conscious jury selection strategy,¹⁷¹ we succeeded in obtaining a jury that was half black and half white. We made a number of other race-conscious decisions at trial: half of the character witnesses we called were African American; we explicitly talked about the value of the decedent's life, notwithstanding his life circumstances at the time of his death; and we explicitly, but cautiously, talked about the role of race in the case.

Like most homicides, the case was very emotional.¹⁷² We believed, however, that the case had gone well for the defense: much of the government's evidence was consistent with self-defense; the medical examiner had supported our theory of how the wounds suffered by the decedent were inflicted; and the defense witnesses had succeeded in painting a picture of the defendant as a good, nonviolent, non-racist person. We expected a quick acquittal.

Instead, the jury deliberated for several hours over two days before reaching a verdict of not guilty. I do not mean to suggest that there is anything wrong with lengthy deliberations; indeed, where one life has been lost and another person's liberty is on the line, and a host of other serious issues are raised, jurors should devote time and serious thought to a case. What we learned from jurors after the verdict, however, confirmed our race-conscious strategy. The jury instantly divided on race lines, with whites believing the defendant innocent of any criminal wrongdoing and African Americans worried that anything short of a conviction would devalue black life. The jury foreper-

167. See *supra* note 135.

168. See *supra* note 164.

169. See Christopher Jencks, *The Homeless* 22, tbl.4 (1994) (stating that 44% of all surveyed homeless were African American). See generally *id. passim* (discussing forces that caused an increase in homelessness during the 1980s).

170. See Holden, *supra* note 135.

171. We explicitly wanted a jury of at least four or five whites, and exercised peremptory challenges with this goal in mind. Of course, there were other considerations, chief among them the jurors' attitudes about self-defense (and, in particular, the taking of life in self-defense), and their attitudes about the homeless. Diane Wiley of the National Jury Project in Minneapolis assisted us in jury selection strategy, development of questions for voir dire, and articulation of the defense theory.

172. The trial featured, among other noteworthy moments, an angry outburst by the decedent's sister in the middle of the defense's closing argument.

son was a white man who had worked for a prominent progressive African American Congressman and had an African American girlfriend. He claimed these were the reasons why he was acceptable to both races. According to the foreperson and other jurors, the jury talked at length about race and privilege and the double standard in criminal justice. They said it was helpful that the defendant had two African American witnesses who vouched for his good character.

My discussion of these two cases is, of course, self-serving in the context of this Article. It is a very small sample of cases, not something that would qualify as even amateur social science. The discussion also suffers from all of the problems that arise when lawyers generalize from unverifiable experience.¹⁷³

Still, in my experience as a criminal lawyer, these cases fit a pattern. Race matters. In most criminal cases, the racial composition of a jury matters. I have also tried many cases involving crimes of sexual violence and domestic violence, and I believe that, at least in some criminal cases, gender matters.

As a result of my own trial experience and what I have learned from jury research, I believe I would be ineffective as a lawyer if I did not make both race-conscious and gender-conscious strategic decisions on behalf of criminal defendants. This includes decisions relating to jury selection.

IV. ETHICS IN CONTEXT: THE OVERRIDING IMPORTANCE OF ZEALOUS CRIMINAL DEFENSE

The Supreme Court may preach as it may, but we cannot banish cultural stereotypes from our thinking The way to achieve [diverse juries] is not to impose arbitrary rules on lawyers about when and why they can use their peremptory challenges.

—George P. Fletcher¹⁷⁴

The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue.

—Barbara Allen Babcock¹⁷⁵

173. See *supra* note 109. I also concede that these cases could support the view held by Jeffrey Abramson and others, see Abramson, *supra* note 7, at 175-76, that the race of jurors is not the overriding factor in trial outcomes. After all, an all-white jury acquitted an African American man notwithstanding credible testimony by white police officers, and a jury with six African Americans who were concerned about the racial implications of a case still acquitted a white man who killed an African American.

174. Fletcher, *With Justice for Some*, *supra* note 62, at 250-51.

175. Babcock, *Voir Dire*, *supra* note 7, at 552.

[The jury is the] criminal defendant's fundamental "protection of life and liberty against race or color prejudice."

—*McCleskey v. Kemp*¹⁷⁶

Criminal defense lawyers practice law in a particular context. The institutional context is the adversarial system.¹⁷⁷ There, notwithstanding ethical mandates to the contrary,¹⁷⁸ prosecutors and defense lawyers are both engaged in mortal combat. The system fosters this and, with rare exception,¹⁷⁹ the lawyers revel in it.

The adversarial system is the best system for defending the rights of the criminally accused¹⁸⁰ and protecting the rights of the poor.¹⁸¹ Strong advocacy—going to the mat for one's client—is the best way to ensure that client's liberty and dignity.¹⁸² Demonstrating zeal on behalf of those accused of crime is an expression of fidelity to those who have no one else. There is virtue in this.¹⁸³

The current cultural and political context is harshly retributive against criminal lawbreakers.¹⁸⁴ No explanation or excuse suffices when a crime has been committed.¹⁸⁵ No prison sentence is too long, no prison conditions too harsh, no method of execution too cruel.¹⁸⁶

It is in this context that the criminal lawyer "discriminates."¹⁸⁷ It is in this context that the criminal lawyer will note the prevailing cultural

176. 481 U.S. 279, 310 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)).

177. See Luban, *Lawyers and Justice*, *supra* note 22, at 56-58.

178. See Model Code of Professional Responsibility EC 7-13 (1980).

179. Unfortunately, in my experience, there are more defense lawyers who demonstrate a woeful lack of zeal than prosecutors whose zeal is appropriately restrained. See Dershowitz, *Best Defense*, *supra* note 38, at 410-14 (noting the problem of under-zealousness on the part of defense lawyers).

180. See Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 Wm. & Mary L. Rev. 63 (1996) [hereinafter Freedman, *Postmodern Zeal*] (responding to criticism of the adversary system). But cf. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 Wm. & Mary L. Rev. 5 (1996) (criticizing the adversary system from the perspective of multiculturalism).

181. See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. on Disp. Resol. 1 (1993) (critically examining the emphasis on "harmony" values over "justice" values in alternative dispute resolution especially on behalf of those with little power).

182. See Freedman, *Postmodern Zeal*, *supra* note 180, at 63 ("I premise my own system of lawyers' ethics on individual dignity and autonomy."); Smith & Montross, *supra* note 67.

183. See Smith & Montross, *supra* note 67.

184. See *supra* notes 75-76 and accompanying text; see also Elliott Currie, *Crime, Justice, and the Social Environment*, in *The Politics of Law* 294, 299 (David Kairys ed., 2d ed. 1990) (discussing the high rate of incarceration in the United States in comparison to other industrial democracies).

185. Even well-known criminal defense lawyers have jumped on this bandwagon. See, e.g., Alan M. Dershowitz, *The Abuse Excuse: And Other Cop-Outs, Sob Stories, and Evasions of Responsibility* (1994).

186. See Wendy Kaminer, *It's All the Rage: Crime and Culture* 6-7 (1995).

187. See Fletcher, *Political Correctness*, *supra* note 161, at 6 ("The problem with addressing discrimination in the selection of particular juries is that the activity is, by

sensibilities, stereotypes, and prejudices and use them on behalf of clients who are typically the unhappy targets of these sensibilities, stereotypes and prejudices.¹⁸⁸

It is hard enough for a criminal defendant standing trial; there are enough wrongful assumptions, prejudices, and hostilities directed toward the criminally accused.¹⁸⁹ When one factors in that most criminal defendants are poor and disproportionately nonwhite,¹⁹⁰ the situation is that much worse.¹⁹¹

No matter how personally distasteful or morally unsettling,¹⁹² zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients.¹⁹³ Criminal lawyers are "not allowed to refrain from lawful advocacy simply because it offends" them.¹⁹⁴

This applies to jury selection¹⁹⁵ as well as a range of other strategic decisions at trial.¹⁹⁶ Although this is increasingly difficult in the face

its nature, discriminatory. Lawyers want some people on the jury and not others."); see also Hunt, *supra* note 109 ("There isn't a trial lawyer in this country who wouldn't tell you[,] if he were being honest[, that:] I don't want an impartial jury. I want one that's going to find in my client's favor." (quoting Herald Price Fahringer, a well-known criminal defense lawyer)).

188. See Nilsen, *supra* note 39, at 9 ("It is because bias is so pervasive in the criminal justice system that lawyers rely on it to help win cases. Stereotypes based on gender, disability, and sexual preference are commonly exploited." (footnotes omitted)). But see Vogelmann, *supra* note 165, at 576-77 (arguing that the white police officer defendants prosecuted in state court for beating Rodney King benefited from racist stereotypes about "big black men").

189. See 1 National Jury Project, Inc., *supra* note 9, § 2.04[2][a], at 2-12 to 2-21 (indicating that, contrary to well-established constitutional principles, many people believe that if a person has been arrested, she or he must have done something wrong, a defendant has some burden to prove his or her innocence, and that defendants should be required to testify on his or her own behalf); see also Hunt, *supra* note 109 (referring to two national polls which indicate that a third or more of Americans consider a criminal defendant "probably guilty," and noting that few admit this in the courtroom).

190. See Smith & Montross, *supra* note 67.

191. See Brown, *Shield for the Pariah*, *supra* note 8, at 1208 ("[T]he peremptory is one of the few tools we have to try to right the imbalance faced by a defendant who is unpopular, who nobody likes, who jurors start out hating because of the color of his skin, or because of some other thing over which that person has no control.").

192. See *supra* notes 61-62 and accompanying text.

193. See Kaine, *supra* note 49, at 373-83 (examining ethical codes relating to a lawyer's use of race in strategic judgments and finding that they say nothing about this practice); see also Nilsen, *supra* note 39, at 17, 27-28 (noting that, although it is difficult to embrace zealous advocacy when it appears to be "exploitative, it is important . . . to understand fully the criminal lawyer's obligation to pursue every lawful advantage on behalf of her client"). But cf. Vogelmann, *supra* note 165, at 574-75 (concluding that "the blatant exploitation of racism, homophobia or ethnic prejudices by a defense lawyer is unethical").

194. See Nilsen, *supra* note 39, at 17.

195. See *id.* at 34-35.

196. See *id.* at 33-37 (discussing the role of bias in crafting a theory of defense, investigation, judge shopping, jury selection, plea bargaining tactics, and investigation).

of *Batson*, *J.E.B.*, and *McCollum*, it must be done.¹⁹⁷ The preeminent obligation of criminal defense lawyers is zealous advocacy, putting the government to its burden of proof and fighting for the individual accused above all others.¹⁹⁸ Hence, in order to abide by this overriding professional obligation, criminal defense lawyers must do what they can to circumvent *McCollum*.

There are ways to do this. Much has been written about prosecutorial pretext in order to avoid the strictures of *Batson*.¹⁹⁹ Defense lawyers can always cite occupation, neighborhood, lack of experience with the issues raised, and even failure to look the defendant in the eye²⁰⁰ as reasons for striking prospective jurors.²⁰¹

197. See *id.* at 34-35 (discussing the difficulties of eliminating jurors who would be least sympathetic to a defendant's case because of restrictions on the exercise of peremptory challenges created by the Supreme Court and state courts). Professor Nilsen shares the particular dilemma I experience as a clinical law teacher:

Suppose the defendant was a battered woman on trial for injuring her abusive husband. Is it fair to preclude her from using her peremptory challenges to exclude men in favor of women? As a teacher, how do I advise students on this issue? It is a challenge to delicately weave our way through this thicket in search of perfect, non-pretextual, and neutral challenges even while believing that race, gender, religion, and sexual orientation do indeed make a difference.

Id. at 35 (footnote omitted).

198. This is especially so for criminal lawyers representing the poor. See *id.* at 21; Luban, *Criminal Defenders*, *supra* note 22, at 1765.

199. See *supra* note 44.

200. But see *Tursio v. United States*, 634 A.2d 1205, 1212-13 n.7 (D.C. 1993) (stating that peremptory challenges based on body language and demeanor must be closely scrutinized).

201. During the time I was writing this Article, I tried a drug distribution case with one of the post-graduate fellows in the E. Barrett Prettyman Fellowship program at the Georgetown University Law Center. The theory of defense was police fabrication: our client had not distributed drugs to anyone. Instead, the police invented a story involving the defendant when they discovered drugs near him. We wanted jurors who would be able to find the testifying police officers incredible based on a number of relatively small inconsistencies in their accounts. Believing that African American jurors would be better jurors for this case, see *supra* Part III, we exercised almost all of our peremptory challenges on whites. The prosecutor noticed this and made a "reverse *Batson*" objection, always a dramatic, morally-tinged moment. In response, we easily rattled off race-neutral reasons for our strikes (for example, one juror's employment rendered him too removed from life on the street to fairly hear the case, another juror had too many police relations, another juror had been the victim of street crime that may have been drug-related) until we came to one juror about whom we knew absolutely nothing except for his race. He had not raised his hand in response to any voir dire questions. The computer sheet only indicated that he was retired and lived in the northwest section of the city (the largest residential neighborhood and where most white people live). The man was white, in his sixties, and had an oddly ominous, blank stare. When we consulted our client about whether he wanted this man on the jury, our client immediately said "no," because the prospective juror made him uncomfortable. While I believe that our client's discomfort was not necessarily race-based and ought to be honored, see 4 Blackstone, *supra* note 1, at *1024, when we tried to proffer it, the judge dismissed it out of hand. We immediately countered with a more concrete reason: the prospective juror never looked at

Defense lawyers should do what they can to obtain a critical mass of jurors who are the same race as the defendant.²⁰² Jury research shows that a single dissenting juror almost never succeeds in either hanging or reversing the direction of a jury.²⁰³ Laboratory and field studies demonstrate that without a minority of at least three jurors, group pressure is simply too strong.²⁰⁴ One or two dissenting jurors eventually yield to the majority view.²⁰⁵

Criminal lawyers should seek same-race or same-sex jurors in certain cases not because they want jurors who are "partial" to the defendant, but because they want jurors who are *impartial*.²⁰⁶ If a critical mass of jurors are the same race or same sex as the defendant, at least as to those jurors, unconscious racism or sexism does not play a significant role in deliberations.²⁰⁷

our client the entire time he was in the jury box or the courtroom. The judge accepted this reason and overruled the prosecutor's objection.

In the spirit of full disclosure, after several hours of deliberations over two days, our client was found guilty by a jury of ten African Americans and two whites. I do not mean to suggest that a jury that is largely the same race as the defendant will automatically acquit. I do think, however, that this particular jury struggled more over the evidence than a largely white jury would have. In addition, although we had achieved more than a "critical mass" of African American jurors by the time we got to the white man in the venire, I stand behind the practice of getting as many same-race jurors, especially when it comes to representing minority defendants.

202. Cf. Fletcher, *Political Correctness*, *supra* note 161, at 6 ("It is perfectly sensible to conclude, as did the Court in *Batson*, that when the prosecution discriminates against people who look like the defendant, the defendant is less likely to get a fair trial.").

203. See Johnson, *Black Innocence*, *supra* note 104, at 1698. Professor Johnson proposes that there be a "right" to racially similar jurors and this right belongs to the defendant, not the prosecution or public. See *id.* at 1695-1700. The defendant could waive this right if he or she wished, but a court would have to determine that such a waiver was knowing and intentional. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (requiring "an intentional relinquishment or abandonment of a known right or privilege").

204. See Kalven & Zeisel, *supra* note 107, at 462-63; Michael J. Saks, *Jury Verdicts: The Role of Group Size and Social Decision Rule 16-18* (1977); Dale W. Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 748 (1959).

205. See Kalven & Zeisel, *supra* note 107, at 462-63; Saks, *supra* note 204, at 16-18; Broeder, *supra* note 204, at 748; Rita James Simon & Prentice Marshall, *The Jury System*, in *The Rights of the Accused in Law and Action* 211, 227-27 (Stuart S. Nagel ed., 1972).

206. See Golash, *supra* note 119, at 169 (suggesting that jurors may be "more nearly 'impartial' when they try a defendant of their own race"); see also Hunt, *supra* note 109 (quoting Richard Lempert: "[T]he effort to pick jurors biased in your favor fails, because the other side spots them and gets rid of them.").

207. See Johnson, *Black Innocence*, *supra* note 104, at 1678-79 (noting that jury instructions on racial bias are ineffective, because jurors often do not understand or pay attention to jury instructions, and because the problem of race and guilt attribution is unconscious). See generally Lawrence, *supra* note 114, at 324 (discussing unconscious racism and proposing that courts "evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches a racial significance").

CONCLUSION

The Anglo-American jury is a remarkable political institution. We have had it with us for so long that any sense of surprise over its main characteristics has perhaps somewhat dulled. It recruits a group of twelve laymen, chosen at random from the widest population; it convenes them for the purpose of the particular trial; it entrusts them with great official powers of decision; it permits them to carry on deliberations in secret and to report out their final judgment without giving reasons for it; and, after their momentary service to the state has been completed, it orders them to disband and return to private life. . . . The jury is thus by definition an exciting experiment in the conduct of serious human affairs, and it is not surprising that, virtually from its inception, it has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism.

—Harry Kalven, Jr. and Hans Zeisel,
*The American Jury*²⁰⁸

Criminal defenders must be good lawyers first and then, if *possible*, good citizens. If the two are in conflict, criminal defense lawyers must always choose the obligation to their client over the obligation to their community. Criminal lawyers already have their hands full trying to stave off disaster for an individual client; they cannot be responsible for fixing the intractable problems of racism and sexism.²⁰⁹

Given the significance of race and gender in American life, criminal defense lawyers must not regard *Batson*, *J.E.B.*, and *McCullum* as an ethical mandate. They must be wise about the role of race and gender in jury deliberations and attribution of guilt. In jury selection, as in all strategic decisions, they must be zealous, fiercely loyal advocates, using whatever they can to preserve their client's liberty.

208. Kalven & Zeisel, *supra* note 107, at 3-4.

209. See Fletcher, *Political Correctness*, *supra* note 161, at 11 (“[Lawyers] have a job to do. Neither the prosecution nor the defense has time to worry whether its tactics, in the Court’s words, ‘ratify and reinforce prejudicial views . . .’”).